In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 172

THE UNITED STATES, PETITIONER

v.

THE SEMINOLE NATION

REPLY MEMORANDUM FOR PETITIONER

In its brief in opposition the respondent suggests that this Court lacks jurisdiction of the Government's petition for certiorari. It is submitted that this point is without merit.

The judgment of the Court of Claims was entered December 2, 1935 (R. 29). A motion for new trial was made February 6, 1936, and denied March 2, 1936 (R. 30). On May 13, 1936, the Government filed a motion for leave to file a second motion for new trial (R. 30). Although this motion for leave to file did refer to R. S. Sec. 1088 as an explanation for the Government's request, it did not state that the attached second motion for a new trial was based on R. S. Sec. 1088 (R. 30). Moreover, the attached motion, which

spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion.

On May 18, 1936, the lower court granted the motion for leave to file the second motion for a new trial (R. 30). The second motion for a new trial, unlimited in phraseology, was filed on May 18, 1936 (R. 30). Then, as the brief in the lower court shows, it was argued on June 1, 1936 (R. 30) on a broad basis without being limited to R. S. Sec. 1088. The second motion for a new trial was entertained by the Court of Claims and was overruled on June 8, 1936 (R. 30). *It is upon this second motion for a new trial* (not, as the respondent supposes, upon the preceding motion for leave to file the second motion for a new trial) *that the Government bases its contention that this Court has jurisdiction.* In this contention the Government is fully supported by *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498, where it is pointed out (p. 499):

> If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition.

Respectfully submitted.

STANLEY REED,
Solicitor General.

OCTOBER 1936.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	3
Treaties and statutes involved	4
Statement	4
A. Trust fund claims	6
B. Miscellaneous claims	14
Specification of errors to be urged	16
Summary of argument	19
Argument	23
I. The jurisdiction of the Court of Claims was limited to claims of the Seminole nation arising from payments made after July 1, 1898, by the Government, from trust funds, created under Seminole treaties or agreements, to persons other than the Seminole Tribal Treasurer	23
II. The Government is not liable to the Seminoles for the $864,702.58 which it paid out of Seminole trust funds to the Tribal Treasurer from the fiscal year 1899 through the first half of the fiscal year 1907	39
A. Section 19 of the Curtis Act does not apply to the type of trusts involved in Item 8	40
B. If the payments were merely in violation of Section 19 of the Curtis Act, the Seminoles have no standing to complain of that violation since the section gave to them no right of action	58
C. If the payments were in violation of Section 19 of the Curtis Act, the Seminoles are estopped to complain, inasmuch as the payments were made at their request and with their consent	65
III. The Government is not liable to the Seminoles for the $57,500 which it paid out of the trust fund established by Article III of the Treaty of 1866 to the Tribal Treasurer from 1875 to 1898, inclusive	66

101635—36——1

Argument—Continued. Page

IV. The Government is not liable to the Seminoles for the $154,455.30 which it paid from 1920 to 1930, inclusive, out of the principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897 ---------- 68

V. The Government is not liable to the Seminoles for $9,068.24 on account of its promise, under Article VI of the Treaty of 1866, to construct agency buildings_ 74

VI. The Government is not liable to the Seminoles for $61,563.42 on account of its promise in Article VIII of the Treaty of 1856 to provide annually for ten years $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,200 for the support of smiths and smith shops ---------- 77

A. The Resolution of February 22, 1862 ---------- 78

B. The Indian Appropriation Act of 1863 ---------- 80

C. The Indian Appropriation Acts of 1864, 1865, and 1866 ---------- 84

D. The treaty of March 21, 1866 ---------- 85

VII. The Government is entitled to have set off against its underpayments of amounts due in some years under Article VIII of the Treaty of 1856 and Article III of the Treaty of 1866 the amounts by which in other years it made overpayments or miscellaneous payments on those and other treaty obligations ---------- 88

Conclusion ---------- 94

CITATIONS

Cases:

Alaska Steamship Co. v. *United States*, 290 U. S. 256 ---------- 57

Arwshan v. *Meshaka*, 288 Mass. 31 ---------- 91

Bacon v. *Commissioner of Corporations and Taxation*, 266 Mass. 547, 549 ---------- 79

Bailey v. *Smith*, 214 Mass. 114 ---------- 91

Baltimore & Ohio S. W. R. Co. v. *Carroll*, 290 U. S. 73 ---------- 38

Blackfeather v. *United States*, 190 U. S. 368 ---------- 62

Braman v. *Foss*, 204 Mass. 404 ---------- 22

Chicago, Milwaukee & St. Paul Ry. Co. v. *McCaull-Dinsmore Co.*, 253 U. S. 97 ---------- 76

Dibbs v. *Goren*, 11 Beav. 483 ---------- 91

Duncan v. *Jaudon*, 15 Wall. 165 ---------- 66

Equitable Trust Co. v. *Miller*, 185 N. Y. Supp. 661, aff'd 197 App. Div. 391, aff'd 233 N. Y. 650 ---------- 91

Field v. *Clark*, 143 U. S. 649 ---------- 83

Finn v. *United States*, 123 U. S. 227 ---------- 20

Fleming v. *McCurtain*, 215 U. S. 56 ---------- 62

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498 ---------- 2

Hammond v. *Hammond*, 169 Mass. 82 ---------- 91

Heiner v. *Diamond Alkali Co.*, 288 U. S. 502 ---------- 83

Cases—Continued. Page

King's Estate, 147 Pa. 410 ---- 91
Lamin v. *Buckley*, 256 Mass. 78 ---- 66
Livsey v. *Livesey*, 3 Russ. 287 ---- 91
Lone Wolf v. *Hitchcock*, 187 U. S. 553 ---- 69–70, 85
Magee v. *United States*, 282 U. S. 432 ---- 66
Matson Navigation Co. v. *United States*, 284 U. S. 352 ---- 38–39
Merritt v. *United States*, 267 U. S. 338 ---- 26
Morrison v. *Work*, 266 U. S. 481 ---- 69
N. & G. Taylor Co., Inc. v. *Anderson*, 275 U. S. 431 ---- 38
Niles, Matter of, 113 N. Y. 547 ---- 66
Norton v. *Ray*, 139 Mass. 230 ---- 34
Panama Refining Co. v. *Ryan*, 293 U. S. 388 ---- 83
Peck v. *Kinney*, 143 Fed. 76 ---- 79
Pope v. *Farnsworth*, 146 Mass. 339 ---- 66
Ryland v. *Hollinger*, 117 Fed. 216 ---- 31
Sac and Fox Indians of Mississippi in Iowa v. *Sac and Fox Indians of Mississippi in Oklahoma, and the United States*, 220 U. S. 481 ---- 60
Schechter Corp. v. *United States*, 295 U. S. 495 ---- 83
Stephens v. *Cherokee Nation*, 174 U. S. 455 ---- 69, 85
Town of Hartland v. *Damon's Estate*, 103 Vt. 519 ---- 79
United States v. *Babcock*, 250 U. S. 328 ---- 24
United States v. *Henry Prentiss & Co.*, 288 U. S. 73 ---- 38
United States v. *Martinez*, 195 U. S. 469 ---- 39
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62 ---- 38
Wisconsin & Michigan Ry. Co. v. *Powers*, 191 U. S. 379 ---- 2

Statutes:

Act of July 5, 1862, c. 135, 12 Stat. 512 ---- 14
Act of March 3, 1863, c. 99, 12 Stat. 774 ---- 14
Act of June 25, 1864, c. 148, 13 Stat. 161 ---- 14
Act of March 3, 1865, c. 127, 13 Stat. 541 ---- 14
Act of April 15, 1874, c. 97, 18 Stat. 29 ---- 53
Act of July 31, 1894, c. 174, 28 Stat. 162 (Dockery Act) ---- 50
Act of June 28, 1898, c. 517, 30 Stat. 495 (Curtis Act) ---- 5
Act to Ratify the Agreement of Dec. 16, 1897, between the Dawes Commission and the Seminole Nation, Act of July 1, 1898, c. 542, 30 Stat. 567 ---- 49
Act of July 1, 1898, c. 545, 30 Stat. 571, 580 ---- 46
Act of March 1, 1899, c. 324, 30 Stat. 924, 933 ---- 46
Act of May 31, 1900, c. 598, 31 Stat. 221, 230 ---- 46
Act of March 3, 1901, c. 832, 31 Stat. 1058, 1068 ---- 46
Act of May 27, 1902, c. 888, 32 Stat. 245, 253 ---- 46
Act of March 3, 1903, c. 994, 32 Stat. 982, 989 ---- 46
Act of April 21, 1904, c. 1402, 33 Stat. 189, 199 ---- 46
Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1054 ---- 46
Act of April 26, 1906, c. 1876, 34 Stat. 137 ---- 51
Act of June 21, 1906, c. 3504, 34 Stat. 325, 344 ---- 46
Act of June 30, 1919, c. 4, 41 Stat. 3, 23 ---- 71

Statutes—Continued. Page

Act of Feb. 14, 1920, c. 75, 41 Stat. 408, 427–428 72
Act of March 3, 1921, c. 119, 41 Stat. 1225, 1242 72
Act of May 24, 1922, c. 199, 42 Stat. 552, 575 72
Act of Jan 24, 1923, c. 42, 42 Stat. 1174, 1196 72
Act of May 20, 1924, c. 162, 43 Stat. 133 1
Act of June 5, 1924, c. 264, 43 Stat. 390, 398 72
Act of Feb. 13, 1925, c. 229, 43 Stat. 936, U. S. C., Title 28, Sec. 288 1
Act of March 3, 1925, c. 462, 43 Stat. 1141, 1148 72
Act of May 10, 1926, c. 277, 44 Stat. 453, 460 72
Act of Jan. 12, 1927, c. 27, 44 Stat. 934, 948 72
Act of March 7, 1928, c. 137, 45 Stat. 200, 216 72
Act of Feb. 19, 1929, c. 268, 45 Stat. 1229 4
Act of March 4, 1929, c. 705, 45 Stat. 1562, 1577 72
Appropriation Act for the fiscal year ending June 30, 1918, for the legislative, executive, and judicial expenses of the Government, Act of March 3, 1917, c. 163, 39 Stat. 1070, 1106, U. S. C., Ti. 5, § 66 71
Deficiencies Appropriation Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Ti. 28, § 47 71
Indian Appropriation Act, Act of Aug. 30, 1852, c. 103, 10 Stat. 41 60
Indian Appropriation Act, Act of July 5, 1862, c. 135, 12 Stat. 512, 528 80
Indian Appropriation Act, Act of March 3, 1863, c. 99, 12 Stat. 774, 793 84
Indian Appropriation Act, Act of June 25, 1864, c. 148, 13 Stat. 161, 180 84
Indian Appropriation Act, Act of March 3, 1865, c. 127, 13 Stat. 541, 562 84
Indian Appropriation Act, Act of March 2, 1867, c. 173, 14 Stat. 492, 507 62
Indian Appropriation Act, Act of July 4, 1884, c. 180, 23 Stat. 76, 85 63
Indian Appropriation Act, Act of March 2, 1889, c. 412, 25 Stat. 980 7
Indian Appropriation Act, Act of July 1, 1898, c. 545, 30 Stat. 571, 595 71
Indian Appropriation Act, Act of March 3, 1903, c. 994, 32 Stat. 982 49
Indian Appropriation Act, Act of May 25, 1918, c. 86, 40 Stat. 561, 580 70
Resolution of Feb. 22, 1862, No. 13, 12 Stat. 614 14
R. S., Sec. 1088, Judicial Code, Sec. 175, U. S. C., Ti. 28, § 282 2
Treaty of Oct. 11, 1842, 7 Stat. 596 60
Treaty of Aug. 7, 1856, 11 Stat. 699 6
Treaty of March 21, 1866, 14 Stat. 755 7

Miscellaneous:

	Page
American Law Institute, *Restatement of the Law of Trusts*	34
Annual Reports of the Dept. of the Interior for the fiscal year ended June 30, 1899, 56th Cong., 1st Sess., House Doc. No. 5, Indian Affairs, Part I	55–56
Annual Reports of the Dept. of the Interior for the fiscal year ended June 30, 1900, 56th Cong., 2nd Sess., House Doc. No. 5, Indian Affairs, p. 86	67
Annual Reports of the Dept. of the Interior for the fiscal year ended June 30, 1901, 57th Cong., 1st Sess., House Doc. No. 5, Indian Affairs, Part I	56
Annual Reports of the Dept. of the Interior for the fiscal year ended June 30, 1902, 57th Cong., 2nd Sess., House Doc. No. 5, Indian Affairs, Part I	56–57
Bogert, *Trusts and Trustees*	91
Cong. Rec., 55th Cong., 2nd Sess., Vol. 31, Part IV, page 3869; Apr. 14, 1898 (Curtis Act)	43
Daniell's *Chancery Pleading and Practice* (6th Am. Ed.)	30
General Accounting Office Reports	90
Opinion of Attorney General Bonaparte, 26 Op. Atty. Gen. 340	50
Opinion of Assistant Attorney General Van Devanter, July 12, 1898	50
Opinion of Assistant Comptroller L. P. Mitchell, Aug. 23, 1898	49
Perry on *Trusts and Trustees* (7th ed.)	66
Preliminary Draft of Rules of Civil Procedure, prepared by Advisory Committee of Supreme Court (May 1936)	31
Rules of the Court of Claims (1916), Rule 15 (2)	31
Seminole Agreement of Dec. 16, 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567	9
Williston, *Contracts*, Vol. 3, § 1338	76

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v.

THE SEMINOLE NATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims was rendered December 2, 1935, but has not yet been reported.

JURISDICTION

Petition for writ of certiorari was filed July 8, 1936 (R. 34), and granted October 12, 1936.

The jurisdiction of this Court is invoked under Section 4 of the Act of May 20, 1924, c. 162, 43 Stat. 133, 134, and Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, U. S. C., Title 28, Sec. 288.

The judgment of the Court of Claims was entered December 2, 1935 (R. 29). A motion for new trial

was made February 6, 1936, and denied March 2, 1936 (R. 30). On May 13, 1936, the Government filed a motion for leave to file a second motion for new trial (R. 30). Although this motion for leave to file did refer to R. S. Sec. 1088 as an explanation for the Government's request, it did not state that the attached second motion for new trial was based on R. S. Sec. 1088 (R. 30). Moreover, the attached motion, which spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion.

On May 18, 1936, the lower court granted the motion for leave to file the second motion for new trial (R. 30). The second motion for new trial, unlimited in phraseology, was filed on May 18, 1936 (R. 30). Then it was argued on June 1, 1936 (R. 30), on a broad basis without being limited to R. S. Sec. 1088. The second motion for new trial was entertained by the Court of Claims and was overruled on June 8, 1936 (R. 30). *It is upon this second motion for new trial* (not, as the respondent has suggested, upon the preceding motion for leave to file the second motion for new trial) *that the Government bases its contention that this Court has jurisdiction* to review the judgment originally entered (not, as the respondent has suggested, to review the order overruling the motion for new trial. In this contention the Government is fully supported by *Gypsy Oil Co* v. *Escoe,* 275 U. S. 498, where it is pointed out (p. 499):

If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition.

QUESTIONS PRESENTED

1. Whether the claims adjudicated by the Court of Claims were presented to it for decision in the time within which the United States had consented to be sued.

2. Whether Section 19 of the Curtis Act changed the purposes for which, and the persons to whom, moneys due under trusts and statutes relating to the Seminoles should be paid.

3. Whether the Seminoles have a right of action if Section 19 of the Curtis Act is violated.

4. Whether the Seminoles are estopped to complain of any violation of Section 19 of the Curtis Act.

5. Whether Article III of the Treaty of 1866 allowed the Government to pay, from 1875 through 1896, interest on the $50,000 trust to the Seminole tribal treasurer; and, if not, whether the Seminoles are estopped to complain of a violation.

6. Whether any statutes gave to the executive officers of the Government authority to make disbursements of principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897.

7. Whether the Government broke the promise given in Article VI of the Treaty of 1866; and if so, whether the lower court applied a correct rule of damages.

8. Whether any statutes or treaties authorized or ratified the diversion to loyal refugee Indians of the amounts appropriated from 1858 to 1866 for Seminole schools, agricultural assistance, and blacksmiths.

9. Whether, in the absence of a formal counterclaim, the Government was entitled to have the lower court adjudicate its claim that, against its underpayments in some years of interest on trusts, there should be offset overpayments and miscellaneous payments in other years.

TREATIES AND STATUTES INVOLVED

In the Appendix, separately printed, there are set forth, first, the statutes upon which the jurisdiction of the Court of Claims is based; next, the treaties with the Seminole Indians; then, in chronological order, the other statutes involved; then, the relevant opinions of the Comptroller of the Treasury and of Assistant Attorney General Van Devanter; and, finally, excerpts from reports of the General Accounting Office (which are relied upon not as evidence, but for illustrative purposes, see pages ~~89, 91–92~~, *infra*).

STATEMENT

The Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by the Act of Feb. 19, 1929, c. 268, 45

Stat. 1229, conferred upon the Court of Claims jurisdiction to adjudicate claims of the Seminole Indians against the United States growing out of treaties, agreements, or statutes of the United States, provided that suit was instituted by June 30, 1930 (R. 9–10, fdg. I).

On February 24, 1930, the Seminole Nation (hereinafter called the "Seminoles") filed in the Court of Claims a petition (R. 1–3) alleging that it "was the owner of large trust funds, held in trust by the defendant [the Government] for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff" (R. 1, par. II); that after the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, the Government impounded the funds, "refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes" (R. 1, par. III); and that "from July 1st, 1898, until the present time, defendant * * * in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds" (R. 2, par. VI). The petition prayed that "defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds *during said period*" [i. e., July 1, 1898, to February 24, 1930] and that "plaintiff

have judgment against the defendant in such sum or sums as appear to this court to be *expended* without authority of law" (R. 2, par. VIII).

On September 19, 1934, the Seminoles filed an amended petition (R. 3–8). In addition to repeating the earlier allegations of a wrongful expenditure between July 1, 1898, and the present time, of trust funds created by treaties and agreements, the amended petition presented for adjudication claims for failure to make payments due under trusts created by treaties, agreements, and statutes, both before and after 1898, and claims for failure to make miscellaneous payments due under treaties. These claims are so numerous that it will be convenient to state, first, the claims arising out of the trust funds, and then the miscellaneous claims.

A. TRUST FUND CLAIMS

There were, in all, four trusts held by the Government for the benefit of the Seminole Nation:

1. A trust fund of $500,000 (originally two funds, each of $250,000), established by Article VIII of the Treaty of August 7 ,1856, 11 Stat. 699, 702, upon which the Government agreed to pay annual interest of $25,000 (R. 11, fdg. III). The terms of this trust are stated in the margin.[1]

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[1] By article VIII of the Treaty of 1856, the United States agreed with the Seminoles—

> * * * to invest for them the sum of two hundred fifty thousand dollars, at five percent. per annum, the interest to be regularly paid over to them *per capita*

2. A trust fund of $70,000, established by Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756–757, upon which the Government agreed to pay annual interest of $2,500 for "the support of schools" and annual interest of $1,000 "for the support of the Seminole Government" (R. 12, fdg. VIII). The terms of this trust are stated in the margin.[2]

3. A trust fund of $1,500,000 established by Section 12 of the Indian Appropriation Act for the fiscal year 1890, Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, upon which Congress directed that there be paid annual interest of $75,000 to the

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as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *.

[2] By Article III of the Treaty of 1866, the United States agreed with the Seminole Nation that—

> * * * The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole goverment.

Seminole tribal treasurer. The terms of this trust are stated in the margin.[3]

4. A trust fund of $500,000, which was originally part of the $1,500,000 just mentioned, but which was "set apart as a permanent school fund" under

[3] The Court of Claims neglected to make a finding with respect to the source of this trust. However, there can be no doubt, as the lower court's opinion, Item 8, apparently recognizes (R. 24), that the trust was set up in these words by Section 12 of the Indian Appropriation Act for the fiscal year 1890:

> SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: *One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semiannually to the treasurer of said nation*, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; * * * [Italics added.]

authority conferred by the Seminole Agreement of December 16, 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568. $25,000 of the $75,000 mentioned in the preceding paragraph represents the annual interest on this trust fund (R. 27. Opinion, Item 9). The terms of this trust are stated in the margin.[4]

The Seminoles claim that the Government has in various ways violated its fiduciary duties under each of these trusts. However, with respect to the first three[5] of these trusts, in addition to the differing claims, one common claim was presented, which it will be convenient to state at once.

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[4] The Act to Ratify the Seminole Agreement of 1897 provided:

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

Apparently this $500,000 trust for the education of children was not actually set apart until 1906, which is several years after the Seminole agreement went into effect.

[5] Our petition for certiorari (Pet. 5–6, 22–23) erroneously assumed that the fourth trust was also involved in the lower court's discussion of the Curtis Act (R. 23–26. Opinion, Item 8). See the correction in the respondent's brief in opposition (Br. Opp. 27–28).

The common claim relates to the period from the fiscal year 1899 through the first half of the fiscal year 1907. During this period the Government, under the first three trusts just referred to, was obligated to pay annual interest at the rate of $25,000, plus $3,500, plus $75,000, or a total of $879,750 in 8½ years. The lower court found that for this period the Government did pay the Seminole tribal treasurer $864,702.58 (R. 14, fdg. XII). But the court held that after the passage of Section 19 of the Curtis Act, Act of June 28, 1898, c. 517, 30 Stat. 495, 502, the Government should not have made these payments to the tribal treasurer and that its departure from the statute gave the Seminoles a cause of action. The court thereupon adjudged that the Government was liable to the Seminoles for $864,702.58, the amount theretofore paid to the Seminole tribal treasurer—not $879,750, the amount promised (R. 26. Opinion, Item 8).

In addition to this common claim there are different claims with respect to the first, second, and fourth trusts.

With respect to the $500,000 trust established by the Treaty of 1856, the Seminoles claim that the Government, though it promised to pay $25,000 a year, made underpayments in 1867–1874, 1876, 1879, and 1907–1909. The lower court found that in each of those years there was an underpayment and, after tabulating those underpayments (R. 12, fdg. VI), concluded that the total shortage was

$154,551.28 (R. 19-20. Opinion, Item 3). The Government contended that against this apparent shortage there should be credited as offsets (a) the amounts by which in the years 1875, 1877, 1880, 1882, and 1883 the Government had overpaid the $25,000 promised; (b) the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation; and (c) the amounts shown to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles." The lower court refused to make findings as to, or to allow credits for, these offsets, on the ground that the Government had not formally filed a counterclaim (R. 19–20). Instead the court held the Government liable for the full $154,551.28 (R. 20. Opinion, Item 3).

With respect to the $70,000 trust fund established by the Treaty of 1866, the Government promised to pay $2,500 a year for "the support of schools." The Seminoles claim that in some years the Government made underpayments and in other years payments to the wrong person. Regarding underpayments, the lower court found (R. 13, fdg. IX) for the fiscal years 1867 to 1874, inclusive, that the Government paid $16,902.80 (or an underpayment of $3,097.20) and for the fiscal year 1907, $1,750 (or an underpayment of $750). The Government contended that against these apparent shortages there should be credited as offsets miscellaneous amounts, including particularly those

shown by the General Accounting Office Report to have been expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles." The lower court, without making any findings as to the Government's contention, and without giving any reasons for its omission, other than that the Government had not filed a counterclaim (R. 20), held the Government liable for underpayments of $3,097.20 and $750 (R. 20–22. Opinion, Item 5). Regarding payments of this $2,500 annuity to the wrong person, the lower court found (R. 13, fdg. IX) that from the fiscal year 1875 to the fiscal year 1907, inclusive, the Government paid annuities directly to the Seminole tribal treasurer. The payments for the latter part of this period, from 1899 to 1907, have already been discussed (see pages 9–10, *supra*) and are considered in Item 8 of the lower court's opinion (R. 23–26). The payments for the period from 1875 to 1898, inclusive, have not heretofore been discussed. The lower court held (R. 20–22. Opinion, Item 5) that these payments from 1875 through 1898 should not have been made to the Seminole tribal treasurer but should have been disbursed by the Government itself for the support of schools. The lower court concluded (R. 22) that the Government was liable for $57,500 (which apparently represents 23 instead of 24 payments at the rate of $2,500 a year).

With respect to the trust fund established by Section 12 of the Indian Appropriation Act of

1890, which originally amounted to $1,500,000, no claim is made other than the common claim already discussed at pages 9–10, *supra.*

With respect to the $500,000 trust fund set apart by the Seminole Agreement of 1897, the Seminoles claim that the Government made unauthorized diversions of principal. The 1897 Agreement stipulated that the $500,000 "shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people" (R. 26–27). The lower court found (R. 14, fdg. XIII) that the Government disbursed from the principal of this fund (a) for per capita payments, $25,744.50 in 1920 and $6,701.06 in 1921; (b) for equalization of allotments, $490.22 in 1921; and (c) for education, $17,743.43 in 1922, $16,679.86 in 1923, $247.94 in 1924, $6,504.72 in 1925, $12,809.52 in 1926, $17,815.59 in 1927, $19,685.35 in 1928, $1.29 in 1929, and $30,031.82 in 1930. The lower court held that all of these disbursements from principal were illegal and the Government was liable for the total diversions, amounting to $154,455.30 (R. 27. Opinion, Item 9).

B. MISCELLANEOUS CLAIMS

1. By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702 (R. 4, fdg. III), the Government promised the Seminoles—

> to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, * * * *

During the ten years covered by this article, the fiscal years from 1858 to 1867, inclusive, the Government disbursed in payment of these obligations $10,436.58 (R. 11, fdg. IV). The Government contended that it had disbursed the balance of $61,563.42 for the relief and support of loyal refugee Indians, and that this expenditure, having been authorized by the Resolution of Feb. 22, 1862, No. 13, 12 Stat. 614; Section 1 of the Act of July 5, 1862, c. 135, 12 Stat. 512, 528; Section 3 of the Act of March 3, 1863, c. 99, 12 Stat. 774, 793; Section 2 of the Act of June 25, 1864, c. 148, 13 Stat. 161, 180; and Section 5 of the Act of March 3, 1865; c. 127, 13 Stat. 541, 562, fulfilled the obligation under Article VIII of the Treaty of 1856. The lower court made no finding as to whether the $61,563.42 had actually been expended for the benefit of refugee Indians, but merely held that there was no law authorizing the Government to satisfy its treaty obligation in this manner (R. 17). The Government

also contended that the expenditure of the $61,563.42 for the benefit of refugee Indians was ratified by Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759. But the lower court denied the contention, and held the Government liable for the whole balance, $61,563.42 (R. 18, Opinion, Item 1).

2. By Article IX of the Treaty of Aug. 7, 1856, 11 Stat. 699, 703 (R. 11, fdg. III), the Government promised the Seminoles—

> to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars * * *

The Government, however, disbursed for this purpose only $18,210 (R. 12, fdg. VII). The lower court held the Government liable for the balance of $1,790 (R. 20, Opinion, Item 4).

3. By Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758 (R. 12–13, Finding VIII), the Government promised the Seminoles—

> that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert

> to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Government disbursed for this purpose the sum of $931.76 (R. 13–14, fdg. XI). The lower court held the Government liable for the difference between that sum and $10,000, or $9,068.24 (R. 22, Opinion, Item 7).

In addition to the foregoing claims other claims, for which certiorari was not petitioned, were adjudicated by the lower court and considered in its opinion under Items 2, 6, 10, 11, 12, and 13.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that its jurisdiction was limited to claims of the Seminole Nation arising from payments made, after July 1, 1898, by the Government, from trust funds created under Seminole treaties or agreements, to persons other than the Seminole tribal treasurer.

2. In holding that Section 19 of the Curtis Act applied to the three trusts created by Article VIII of the Seminole Treaty of 1856, Article III of the Seminole Treaty of 1866, and Section 12 of the Indian Appropriation Act for the fiscal year 1890, for the benefit of the Seminoles.

3. In holding that the Government is liable to make to the Seminoles a second payment of the $864,702.58 which the Government had already

paid from 1889 to 1907 at their request to the tribal treasurer on account of obligations arising under the said three trusts held for the benefit of the Seminoles.

4. In holding that it was unlawful for the Government, from 1875 to 1898, inclusive, to have paid directly to the Seminole tribal treasurer the interest due on the $50,000 trust fund for the support of schools created by Article III of the Seminole Treaty of 1866; and that the Government is now liable to make to the Seminoles a second payment per capita of any interest so paid.

5. In holding that the Government was not entitled to set off against its underpayments of amounts due under the trust established by Article VIII of the Seminole Treaty of 1856 the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the $25,000 annuity promised, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles."

6. In failing to make findings of fact as to the amounts by which, in the years 1875, 1877, 1880, 1882, and 1883, the Government had overpaid the said $25,000 promised annuity, the amounts paid in 1870 and 1874 at the request of the Council of the Seminole Nation, and the amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfill-

ing Treaties with Florida Indians or Seminole Indians."

7. In holding that the Government was not entitled to set off against its underpayments of amounts due under the $70,000 trust established by Article III of the Treaty of 1866 the miscellaneous amounts expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles."

8. In failing to make findings of fact as to the total amount the Government expended in 1908, 1909, 1910, 1919, and 1921 for "Fulfilling Treaties with Florida Indians or Seminoles", and the portions thereof attributable respectively to the obligations due under the $70,000 trust established under the Treaty of 1866, and the obligations due under the $500,000 trust fund established by the Treaty of 1856.

9. In holding that Congress had not authorized such payments as were made from the principal of the $500,000 trust fund set apart by the Agreement of 1897.

10. In failing to hold that the Government was not liable for a deficiency in the annual payments of $7,200 due under Article VIII of the Treaty of 1856 inasmuch as Congress had authorized the expenditure of those annual payments, and the executive branch of the Government had spent them, for the relief of loyal refugee Indians instead of the purposes originally contemplated.

11. In failing to hold that the Government was not liable for a deficiency in so many of the said annual payments of $7,200 as were due prior to the fiscal year 1867 inasmuch as the Seminoles, by Article VIII of the Treaty of 1866, released any liabilities that might have existed for those years.

12. In failing specifically to find and to hold that to meet the said annual payment of $7,200 for the fiscal year 1867 the Government expended, in the manner provided for in the Treaty of 1866, $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,197.50 for the support of smiths.

13. In holding that the promise in Article VI of the Treaty of 1866 that "the United States shall cause to be constructed, at an expense *not exceeding* ten thousand ($10,000) dollars, suitable agency buildings", should be construed to require the Government to spend the entire $10,000.

14. In holding that by breaking its agreement to erect agency buildings the Government became liable for the difference between the full value of the buildings promised and the cost of the buildings actually erected.

SUMMARY OF ARGUMENT

The statutes on which the jurisdiction of the Court of Claims depended required that claims belonging to the Seminoles be filed by June 30, 1930. By that date the original petition (R. 1–3) was the only pleading filed. According to our analysis, it

presented only one specific set of claims: those which arose from payments made, after July 1, 1898, by the Government, from trust funds, created under Seminole treaties or agreements, to persons other than the tribal treasurer. In giving judgment on other claims which were later presented, the lower court exceeded its jurisdiction and so much of the judgments with respect to them should be reversed, *Finn* v. *United States,* 123 U. S. 227.

Assuming, however, that this Court holds that the lower court had jurisdiction over all the claims presented, we discussed each of them in the following order:

In Point II we consider the claim that the Government is liable to the Seminoles for the amount that it paid out of Seminole trust funds to the tribal treasurer from 1899 through 1907. The Seminoles take the position that these payments were contrary to Section 19 of the Curtis Act, and that the violation gives them a right of recovery. Our first answer is that the language of Section 19 of the Curtis Act is not broad enough to cover the trusts in question; and that an attempt to apply it would change not only the *method* of paying interest but also the *purposes* for which interest is paid. Our second answer is that if Section 19 of the Curtis Act did apply to these trusts, and if it was violated, the Seminoles have no standing to make any complaint. Since the statute was a mere direction from Congress to disbursing officers in

the executive branch of the Government, violation of its terms gave no right of action to private parties; their rights were not infringed unless they also showed that the violation was a breach of contract. *The Sac and Fox Indians,* 220 U. S. 481. Moreover, if the Seminoles have a standing to recover for violations of the Curtis Act, they are estopped since these violations were made at their request and with their consent.

Point III covers the claim that the Government is liable for the amount that it paid to the tribal treasurer from 1875 through 1898 out of the $50,000 trust created by Article III of the Treaty of 1866. We contend that the payment did not violate the terms of the trust, and that if it did, the tribe is estopped to complain since they consented through their official governmental representatives.

Point IV deals with the claim that the executive officers of the Government had been given no authority to spend any part of the principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897. Our contention is that an examination of the relevant statutes shows that the executive officers were given authority for such payments from principal as were made.

Point V concerns the claim of the Seminoles arising from an alleged breach of Article VI of the Treaty of 1866. According to our construction of the Treaty, the promise has not been broken. Even if the respondent's construction be taken,

the lower court has applied an erroneous rule of damages.

In Point VI we take up the claim that the disbursing officers of the Government had no authority to divert to loyal refugee Indians during the Civil War the amounts appropriated for schools, agricultural assistance, and blacksmiths, and that therefore the Government remains liable for the amounts due. We set forth the statutes believed to give the necessary authority, and, while relying on all of them, point particularly to the Indian Appropriation Acts for 1864 to 1866. See pages 83–85, *infra*. We also rely upon the release given by the Seminoles in the Treaty of March 21, 1866.

Point VII, unlike the earlier points, does not attempt to show that a particular claim of the Seminoles is unsound. In that part of the brief we assume *arguendo* the validity of certain Seminole claims of underpayment of interest due on trusts. On that hypothesis we contend that we were entitled, without filing a formal counterclaim, to present for offset overpayments of interest on the same trusts. The lower court ruled to the contrary. It is our position that this ruling of law conflicts with the well-settled rule that "in a bill for an accounting, both parties are actors, and a defendant may have a decree in his favor without the aid of a cross-bill." *Braman* v. *Foss,* 204 Mass. 404, 411. Accordingly we ask that the judgment on this point be reversed and the case remanded.

For the possible convenience of the Court we have printed in the margin a table showing the relation between the order in which the lower court considered the Seminole claims and our order in this brief.[6]

ARGUMENT

I

THE JURISDICTION OF THE COURT OF CLAIMS WAS LIMITED TO CLAIMS OF THE SEMINOLE NATION ARISING FROM PAYMENTS MADE, AFTER JULY 1, 1898, BY THE GOVERNMENT, FROM TRUST FUNDS, CREATED UNDER SEMINOLE TREATIES OR AGREEMENTS, TO PERSONS OTHER THAN THE SEMINOLE TRIBAL TREASURER

We contend that the lower court has adjudicated a number of claims that were outside its jurisdiction.

It is axiomatic that a court has jurisdiction of a suit against the United States only if, and in accordance with the terms upon which, the Government consents to be sued. Accordingly, if the Government consents to suit within a certain period, it

[6] See the following table:

Opinion of the court	This brief	Specification of error
Item 1	I, VI	1, 10, 11, 12.
Item 2		Not specified.
Item 3	I, VII	1, 5, 6.
Item 4	I	1, [illegible]
Item 5	I, III, VII	1, 4, 7, 8.
Item 6		Not specified.
Item 7	I, V	1, 13, 14,
Item 8	I, II	1, 2, 3.
Item 9	IV	9.
Item 10		Not specified.
Item 11		Not specified.
Item 12		Not specified.
Item 13		Not specified.

is essential to the jurisdiction of the court that suit be instituted within the time stipulated. *Finn* v. *United States*, 123 U. S. 227. *United States* v. *Babcock*, 250 U. S. 328, 332.

In the applicable statutes whereby the United States consented to be sued by the Seminoles, a time limit was prescribed. Section 2 of the Act of May 20, 1924, c. 162, 43 Stat. 133, provided that:

> Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims * * *.

Subsequently, Act of Feb. 19, 1929, c. 268, 45 Stat. 1229, provided that "the time within which suits may be instituted * * * shall be extended to June 30, 1930."

In our opinion, these statutes bar every claim which was not specifically, or by reasonable implication, included in a petition filed prior to July 1, 1930.

Section 2 of the Act of May 20, 1924, just quoted, stipulates that "any and all claims * * * shall be forever barred unless suit be instituted or petition filed as herein provided." Probably

no one would read this statute as providing that the filing of *any* petition by the Seminoles preserved *all* their claims. If, for example, they filed a petition specifically seeking recovery for the Government's failure to pay for the support of blacksmiths, and seeking nothing more, that would not give the court jurisdiction of a claim based on the Government's failure to erect a building. An absurd example of that sort shows that the statute must be construed as though it stipulated that "any and all claims shall be forever barred unless suit be instituted or petition filed *with respect to them* as herein provided."

The respondent apparently does not disagree with us thus far: i. e., that a petition presenting one specific claim does not preserve jurisdiction over another unrelated claim. But their counsel argues that this is not the situation at bar. He contends that the original petition filed in this case, the petition of February 24, 1930 (R. 1–3), does not merely present a specific claim, but requests a general accounting of all Seminole claims, which for convenience are divided into those before and others after the Curtis Act (Br. Opp. 12, 14–20). We submit that this construction of their petition is not warranted and that the pleading, instead of being a request for a general accounting, in fact states, and seeks recovery for, only one type of injury having four elements: (1) expenditures by the Government, (2) which were made after July

1, 1898, (3) in violation of a treaty or agreement, (4) from trust funds established by a treaty or agreement.

Before turning to the petition and examining it in detail it is important to observe two general considerations which should lead us to construe the pleading as specific rather than general.

In the first place, there is serious doubt whether, in the jurisdictional statute, Congress intended to authorize the Seminoles to request a general accounting. The first sentence of Section 2 of the Act of May 20, 1924, the applicable statute, declared that "any and all claims * * * shall be forever barred unless suit be instituted or petition filed *as herein provided.*" The second sentence then provided that "the petition shall be verified." Verification would hardly have been made a condition precedent to a petition if all that the Seminoles were required to do was to ask for a general accounting. The sort of claims which Congress envisaged and authorized the Court of Claims to hear were specific statements of injuries suffered.

In the second place, it would be a departure from its usual practice for the Court of Claims to entertain any general petition for an accounting. As this Court has said, *Merritt* v. *United States,* 267 U. S. 338, 341:

> The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the

facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met.

Bearing in mind these general considerations, we are now free to examine in detail the petition of February 24, 1930 (R. 1–3), upon which it is conceded that the jurisdiction of the Court of Claims rests.

In separate numbered paragraphs this petition (*I*) referred to the jurisdictional statute, (*II*) recited "that at all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner of large trust funds, held in trust by the defendant [the Government] for its use and benefit, and that there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff" (R. 1); (*III*) noted that "after the passage of" the Curtis Act of June 28, 1898, the Government "impounded all of the funds of plaintiff, refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes" (R. 1); (*IV*) quoted Section 19 of the Curtis Act; (*V*) charged that other subsequent statutes were irrelevant; (*VI*) stated "that from July 1st, 1898, until the present time, defendant, * * * in violation of the rights of plaintiff under its various treaties and agreements with

defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (R. 2); (*VII*) quoted R. S., Sec. 2097; and (*VIII*) prayed:

> That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff. That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.
>
> Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest at six per centum per annum from the date of the expenditure of the several items constituting said sum.

It is our contention that the foregoing petition is specific and relatively narrow in its statement of the plaintiff's *rights* and the *injuries* which the defendant is alleged to have inflicted.

The only rights which the petition states are said to arise out of trust funds. This is made clear in paragraphs II, VI, and VIII. Nowhere does

the plaintiff set forth a right to a general obligation of the Government such as one arising out of a contract or miscellaneous treaty provisions. Moreover, the only trusts with respect to which rights are claimed are trusts arising out of treaties or agreements. This limitation to a particular type of trust is stated in lines 4–5 of paragraph II and lines 2–3 of paragraph VI. Each time a trust is mentioned the language used is clearly conjunctive, not disjunctive. Thus in paragraph II (R. 1) after trust funds were mentioned, it was emphasized that "there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant." And in paragraph VI (R. 2) the Government's conduct was alleged to be not merely "in violation of its duty as trustee of the funds of plaintiff" but at the same time (not alternatively) "in violation of the rights of plaintiff under its various treaties and agreements." And these references limiting the trusts to those created under treaties or agreements are not broadened by the less specific language of paragraphs III, IV, V, or VIII, since those paragraphs do not purport to state the source of the plaintiff's right or title, but merely deal with action of the defendant (par. III and VIII) or of Congress (par. IV and V).

The wrong which the defendant is stated to have inflicted is likewise circumscribed. First, it is clear that the only wrong alleged is an unlawful expenditure. This is forcibly brought out in para-

graphs VI and VIII and recognized in paragraphs III, IV, V, and VII. Second, the only way in which the expenditure is alleged to be unlawful is that it was "in violation of its [the Government's] duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant." (R. 2, par. VI.) The respondent suggests (Br. Opp. 10) that paragraph VII was intended to assert that the expenditure was also in violation of R. S., Sec. 2097. But that paragraph merely quotes the statute and does not allege a violation of its terms. Like paragraph IV and like the phrase "without authority of Congress", in line 4 of paragraph VI, paragraph VII was included to forestall a defense, not to lay a foundation for a cause of action. If the action were in equity, this part of the petition would be called the "charging part", not the "stating part." Daniell's *Chancery Pleading and Practice* (6th Am. Ed.) *372–374. Indeed, nowhere in the petition does the plaintiff state that the defendant violated any statute,[7] not even in the

[7] Even in paragraph III the plaintiff does not allege that the Government's action was in violation of a statute or was otherwise wrongful. Moreover, if the language of this paragraph could be tortured to spell out complaint against an injury, the injury alleged would be that the "defendant impounded all of the funds of plaintiff" and "refused to further pay them over to plaintiff's National Treasurer." (R. 1.) Such an allegation would be the exact converse of the grievance which the respondent now urges, and for which recovery was allowed by the lower court. See pages 35–37, *infra*.

prayer.[8] Finally, all the unlawful conduct of the defendant is alleged to have occurred since July 1, 1898. This limitation is prescribed [8a] in paragraph VI by the phrase "from July 1st, 1898, until the present time" and is recognized by the request for an accounting in paragraph VIII which covers the "said period" from July 1st, 1898 (R. 2, par. VIII, 1, 8). In attempting to overcome this limitation respondent (Br. Opp. p. 10) has drawn attention to paragraph II, but that paragraph merely states the origin and long duration of the plaintiff's right. It does not purport to state any injury by the defendant. It does not enlarge the period of time covered by the claim, for the claim begins when the right of the plaintiff was alleged to be invaded by the defendant.

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[8] The clauses in the concluding paragraph which contains the prayer do no more than summarize and ask relief on account of wrongs theretofore stated. They do not add original allegations. This is true of the clause in lines 1–2 of paragraph VIII, "That the defendant has *thus* spent, in violation of law, a large amount of the trust funds of plaintiff", and also of the clause, in lines 11–13, asking "that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law."

[8a] For the purpose of testing the sufficiency of a pleading, averments of time and place are material. *Rules of the Court of Claims* (1916) Rule 15 (2) provides that the petition must set forth "a plain, concise statement of facts, giving venue and *date* * * *." Compare *Ryland v. Hollinger*, 117 Fed. 216, 219 (C. C. A.); *Preliminary Draft of Rules of Court Procedure*, prepared by Advisory Committee of this Court. (May, 1936) p. 26, l. 55–58.

If we are correct in our contention that the petition is not a general request for an accounting of all obligations, but for an accounting of expenditures made from trust funds after July 1, 1898, in violation of a treaty, then we submit that it is of no consequence that the petition also included a prayer that "if necessary thereafter, plaintiff be permitted to amend this petition" (R. 2, par. VIII, 1, 10–11). The petition points to one specific claim. The reservation of the right to amend may have the effect of permitting the restatement or clarification of that particular claim. But it can hardly allow petitions to nullify the specific limitation of the jurisdictional Act by presenting, after June 30, 1930, new claims which are entirely different, and have nothing in common but the names of the parties.

The cause of action, as it was outlined in the original petition, bears no resemblance to the following causes of action or claims set forth in the amended petition, filed September 19, 1934 (R. 3–8), four years after the time for invoking the jurisdiction of the Court of Claims had lapsed, but nonetheless adjudicated by that court:

(1) The claim that the Government did not completely perform its promise under Article VIII of the Treaty of August 7, 1856, to pay annually for ten years $3,000 for schools, $2,000 for agricultural assistance, and $2,200 for blacksmiths (R.

16–18; Opinion, Item 1. See pages 14–15, *supra*). This claim, upon which a judgment of $61,563.42 was entered against the Government (R. 18), is not based upon an obligation connected with a trust fund, and the dereliction, if any, occurred before 1898.

(2) The claim that the Government did not completely perform its promise under Article IX of the Treaty of August 7, 1856, to spend $20,000 for improvements (R. 20; Opinion, Item 4. See page 15, *supra*). This cause of action, upon which a judgment of $1.790 was entered against the Government (R. 20), is not connected with a trust fund, and antedates 1898.

(3) The claim that the Government did not completely perform its promise under Article VI of the Treaty of March 21, 1866, to erect agency buildings (R. 22–23; Opinion, Item 7. See pages 15–16, *supra*). This cause of action, upon which a judgment of $9.068.24 was entered against the Government (R. 23), is not connected with a trust fund and antedates 1898.

(4) The claim that in 1867–1874, 1876, 1879, and 1907–1909 the Government made underpayments of interest on the $500,000 trust established by the Treaty of 1856 (R. 19–20; Opinion, Item 3. See pages 10–11, *supra*). Upon this claim of underpayment a judgment of $154,551.28 was entered against the Government (R. 20). But a claim for underpayment is not the claim originally made.

The original claim was for wrongful *expenditures* and disbursements. This is stated most clearly in paragraphs VI and VIII of the petition; but it is also recognized in paragraphs III, IV, V, and VII. Nowhere, expressly or by implication, does the petition complain of an underpayment. And an underpayment is legally very different from a wrongful expenditure: Before the union of law and equity, the former was "an *action at law* against the trustee to enforce payment"; the latter *a suit in equity* "to compel the trustee to redress a breach of trust."[8b] And as another item in this suit illustrates, the damages differ according to which theory is adopted.[8c] Moreover, most of these underpayments are alleged to have occurred prior to 1898.

(5) The claim that from 1867 to 1874, inclusive, and again in 1907, the Government made underpayments of interest on the $70,000 trust established by the Treaty of 1866 (R. 20–22; Opinion, Item 5. See pages 11–12, *supra*). This claim of underpayment, upon which a judgment of $3,097.20 plus $750 was entered against the Government (R. 22), likewise is not similar to a claim

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[8b] American Law Institute, *Restatement of the Law of Trusts*, Sections 198, 199. Compare *Norton* v. *Ray*, 139 Mass. 230, 232.

[8c] If, for example, in the Curtis Act claim recovery had been sought to enforce payment the damages would have been $879,750. But the plaintiff sued instead for a breach of trust through a wrongful expenditure, and recovered only $864,702.58. (R. 26.)

for wrongful expenditure; and, again, most of the underpayments are alleged to have occurred prior to 1898.

(6) The claim that from 1875 to 1898 the Government paid the interest on the $70,000 trust fund established by the Treaty of 1866 to the Seminole tribal treasurer instead of for the support of the Seminole schools (R. 20–22; Opinion, Item 5. See pages 11–12, *supra*). This claim, upon which a judgment of $57,500 was entered against the Government (R. 22), is based on diversions prior to July 1, 1898.

(7) The claim that from 1899 through the first half of the fiscal year 1907, the Government, in violation of Section 19 of the Curtis Act, paid to the Seminole tribal treasurer the annual interest on the three trust funds established by the Treaty of 1856, the Treaty of 1866, and the Indian Appropriation Act of 1890 (R. 23–26; Opinion, Item 8. See pages 9–10, *supra*). Upon this claim a judgment of $864,702.58 was entered against the Government (R. 26).

This entire seventh claim, *as well as the preceding sixth claim,* are, in our opinion, the exact antithesis of, and not included within or consonant with, the cause of action embodied in the original petition of February 24, 1930. As we have already pointed out, in the original petition the plaintiff was complaining solely of a "violation of the rights of plaintiff under its various treaties and agree-

ments" (R. 2, par. VI). Nowhere is complaint made that the Curtis Act or any other statute was violated. The plaintiff merely by way of anticipatory defense pointed out that "the only authority given by said Act" (R. 1, par. IV) and every "subsequent act" (R. 2, par. V) was irrelevant; and that the expenditures were "without authority of Congress." See page 30, *supra*. In short, it may fairly be said that whereas the original petition complains that the Government committed a breach of trust because it did *not* pay the sums to the tribal treasurer[9] but disbursed them for other purposes (R. 1–2, par. II, III, and VI); the amended petition complained (R. 6, par. VIII), and the lower court entered a judgment of $864,-702.58 (R. 26), on the ground that the Government violated a statute because it *did* pay the sums to the tribal treasurer instead of disbursing them through its own agents.

Even if the entire seventh claim is not outside the scope of the original petition, clearly so much of it as is based on the $1,500,000 trust, heretofore called the third trust, see page 7, *supra*, is beyond its scope and is new matter. The original petition

[9] See particularly paragraph III stating: "That from and after the passage of a certain Act of Congress, approved June 28th, 1898 (30 Stat. 495), defendant impounded all of the funds of plaintiff, refused to further pay them over to plaintiff's National Treasurer, and proceeded to disburse them for various purposes as shall hereinafter appear" (R. 1).

set forth only such rights of the plaintiff as were based on treaties and agreements. Every time a trust fund was mentioned it was said to be connected with a treaty or agreement.[10] The plaintiff at no place alleged a right based upon statute, or a right to a trust fund created by statute.[11] Therefore the petition did not go so far as to include the violation of rights arising out of the $1,500,000 trust, which had no connection with a treaty or agreement and existed solely[12] as a result of Section 12 of the Indian Appropriation Act for the fiscal year 1890, Act of March 2, 1889, c. 412, 25 Stat. 980, 1004.

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[10] Thus in paragraph II (R. 1) after trust funds were mentioned, it was emphasized that "there existed various treaties and agreements between said plaintiff and defendant whereby said trust funds were to be managed and invested by defendant." And in paragraph VI (R. 2) the Government's conduct was alleged to be not merely "in violation of its duty as trustee of the funds of plaintiff" but at the same time (not alternatively) "in violation of the rights of plaintiff under its various treaties and agreements."

[11] The respondent concedes in his brief opposing our petition for certiorari (Br. Opp. 13) that so much of the seventh claim as is based on the $1,500,000 trust "has no connection with Paragraph II of the original petition." Respondent then contends that the item "is covered by paragraphs III to VI, inclusive." But those paragraphs do not set forth rights of the plaintiff: paragraphs III and VI deal with conduct of the defendant, and paragraphs IV and V merely contain anticipatory defenses.

[12] The Court of Claims neglected to make a finding with respect to the establishment of this trust, but its opinion recognizes its statutory origin (R. 24).

We submit that the foregoing analysis shows that all but one[13] of the claims now under review were not presented to the lower court in the original petition, the only pleading filed within the jurisdictional period.

In allowing these claims to be incorporated by an amendment made after June 30, 1930, the lower court did not merely violate the ordinary canon that an amendment will not be permitted to introduce a new cause of action after the statute of limitations has run (*N. & G. Taylor Co., Inc.* v. *Anderson,* 275 U. S. 431, 438–439; *Baltimore & Ohio S. W. R. Co.* v. *Carroll,* 280 U. S. 491, 494; *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, 84; see *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68–69); it also entertained a suit against the United States on terms to which the Government never consented, *Finn* v. *United States,* 123 U. S. 227. This error went to the jurisdiction of the Court of Claims and can be raised at any stage[14] of the proceedings. *Matson Navigation Co.*

[13] We do not deny that the Court of Claims had jurisdiction over the claim founded on disbursements from 1920 to 1930, inclusive, from the fourth trust fund of $500,000 set apart by the Seminole Agreement of 1897. See pages 8–9, *supra.* However, we contend that the judgment of $154,455.30 (R. 27) based thereon is erroneous. See pages 68–73, *infra.*

[14] The Government raised the jurisdictional question and made substantially the foregoing argument in the Court of Claims on the second petition for rehearing (R. 30). Thus the statement of the lower court that its jurisdiction was

v. *United States,* 284 U. S. 352, 359. Cf. *United States* v. *Martinez,* 195 U. S. 469.

II

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $864,702.58 WHICH IT PAID OUT OF SEMINOLE TRUST FUNDS TO THE TRIBAL TREASURER FROM THE FISCAL YEAR 1899 THROUGH THE FIRST HALF OF THE FISCAL YEAR 1907.

The Court of Claims found that out of the income of the first three [15] Seminole trusts described at pages 6–8, *supra,* the Government, from the fiscal year 1899 through the first half of the fiscal year 1907, paid to the Seminole tribal treasurer $864,702.58 (R. 14, Fdg. XII). In Item 8 of its opinion (R. 23–26) the lower court considered these payments and held that in making them the Government violated Section 19 of the Curtis Act, which provides:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof *for disbursement,* but payments of all sums to *members of said tribes* shall be made under

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not questioned (R. 16), though accurate when made, does not represent the situation when the case was last reconsidered by that tribunal.

[15] Our petition for certiorari (Pet. 5–6, 22–23) erroneously assumed that the fourth trust was also involved in the lower court's discussion of the Curtis Act (R. 23–26. Opinion, Item 8). See the correction in the respondent's brief in opposition (Br. Opp. 27–28).

> direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics added.]

Thereupon the court entered judgment against the Government for said $864,702.58 (R. 26).

We contend that no recovery should have been allowed on this eighth item for these three reasons, each of which is advanced as a separate defense:

A. The payments did not violate Section 19 of the Curtis Act because Section 19 does not apply to the type of trusts involved in Item 8.

B. If the payments were merely in violation of Section 19 of the Curtis Act the Seminoles have no standing to complain of that violation since the section gave to them no right of action.

C. If the payments were in violation of Section 19 of the Curtis Act, the Seminoles are estopped to complain inasmuch as the payments were made at their request and with their consent.

A. SECTION 19 OF THE CURTIS ACT DOES NOT APPLY TO THE TYPE OF TRUSTS INVOLVED IN ITEM 8

In our opinion, Section 19 of the Curtis Act relates exclusively to the Government's method of paying amounts due to individual Indians, and does not apply to trusts like those at bar which, in 1898, were being held for educational and tribal purposes. This narrow construction is supported

by the language of the statute, its legislative history and its fundamental objective.

The opening clause of the section speaks of a "payment of any moneys * * * to any of the tribal governments or to any officer thereof *for disbursement.*" This language is restricted to those payments which are made to a tribal government or officer as an agent "for disbursement." The phrase "on any account whatever" which appears in this clause does not broaden the restriction but merely recognizes that every payment for disbursement is included, no matter what may be the contract which gave rise to the obligation or the account to which it is charged. The restriction of the first clause is expressly carried over to and rephrased in the second clause. It is there recognized that the first clause has blocked the then customary method of making "payments of all sums to *members of said tribes*", and that a way out of the impasse must be found. Accordingly, the second clause directs that "payments of all sums to *members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him." The remaining clauses of the section deal with a problem arising out of a particular category of payments for disbursement to members of said tribes; that is, the category embracing payments in which disbursement is intended to be on an equality among all the Seminoles, otherwise known as "per capita

payments." And these clauses provide that such "per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

Any other way of reading Section 19 creates more difficulties than it solves and reaches a result which is of no practical benefit to the respondent. Let us, for the sake of argument, suppose that the first clause is broad enough for application not merely to payments for disbursement, but to any and every payment to the tribal governments or to any officer thereof. If this hypothesis be taken, then it follows that all payments of both types are absolutely prohibited except as otherwise provided by special rules in later clauses of Section 19: such is the plain consequence of the unambiguous words of the first clause which stipulate that "*no* payment * * * shall hereafter be made." The special rules which create exceptions to this general ban and which permit payment in certain ways come in the succeeding second and third clauses and relate *only* to "payments * * * to members of said tribes" and to "per capita payments." And so it follows that *if the respondent were correct in arguing that Section 19 had the slightest application to payments other than those for disbursement to members of the Seminole Tribe, then its sole application would be negative, that is, to forbid absolutely and without qualification, such*

payments. Thus, respondent's construction at once ends any cause of action based on the Curtis Act unless it be a cause of action growing out of a promise to make payments to individual members of the Seminole tribe.

The limitation of Section 19 to payments for disbursement is required not only by its language but also by its legislative history. Section 19 of the bill which became the Curtis Act, H. R. 8581, 55th Congress (Cong. Rec., 55th Cong., 2nd Sess., Vol. 31, Part IV, Page 3869, April 14, 1898), provided in its original draft:

> That no payment of any moneys on any account whatever shall hereafter be made to any of the tribal governments or to any officer thereof for disbursement, but payments *of all expenses incurred in transacting their business* and of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics added.]

The opening and final clauses of this draft were virtually the same as the present statute. However, the second clause of the original draft covered not merely "payments * * * of all sums to members of said tribes" but also "payments of all expenses incurred in transacting their [i. e.,

the tribal governments'] business." In striking this latter phrase from the bill as finally enacted, Congress showed that its intent in the first clause and in the section as a whole was merely to change the method of making payments "for disbursement" "to members of said tribes" including "per capita payments." It deliberately left untouched the method of paying sums due to the tribe in its corporate and quasi-sovereign capacity.

Moreover, this redraft of Section 19 carried out the fundamental objective of the legislation, that is, the safeguarding of the rights of individual Indians. The original draft, and respondent's argument, would go farther than this and would alter not merely the *method* of paying money due to individual Indians, but also the *purpose* of the trust funds. Cf. *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481, 486. As is explained more fully in the succeeding paragraphs, the respondent's contention would give to individual Indians the benefit of funds intended for specific educational and tribal purposes.

Inasmuch as Section 19 relates exclusively to the Government's method of paying amounts due to individual Indians, it has no application to the three trusts with which we are now concerned.

The trust to which Section 19 of the Curtis Act is most obviously irrelevant is the second trust, amounting to $70,000, established by Article III

of the Treaty of March 21, 1866, which provided that—

> fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

This treaty states, without the slightest ambiguity, that the purposes of this trust were to give $2,500 annually for "the support of schools" and $1,000 annually "for the support of the Seminole government." It would be a perversion of the purposes of this trust to distribute the interest to individual Indians. Congress never intended to alter or abandon its educational program. In the Curtis Act it merely intended to assure the "members of said tribes" that they would receive the money to which they already had a right; not to give them a right to money dedicated to special purposes.

Moreover, if, *arguendo,* we assume that Congress used in the Curtis Act language which was broad enough to cover this second trust and convert it into a trust for distribution, Congress in later legislation superseded that general command with specific directions that the interest from this trust should be reconverted and applied as before, $2,500

for "the support of schools" and $1,000 "for the support of the Seminole government." In each of the appropriation acts[16] for the period of this claim (from the fiscal year 1899 through the first half of the fiscal year 1907) an appropriation in substantially the following terms was made:

> For interest on fifty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of schools, as per third article of treaty of March twenty-first, eighteen hundred and sixty-six, two thousand five hundred dollars;
>
> For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per same article, same treaty, one thousand dollars * * *

The third trust is also outside the scope of Section 19 of the Curtis Act. This trust of $1,500,000 was established by Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004 (which may be conveniently referred to as the Indian Appropriation Act of 1890) in the following words:

> SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred

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[16] Act of July 1, 1898, c. 545, 30 Stat. 571, 580; Act of March 1, 1899, c. 324, 30 Stat. 924, 933; Act of May 31, 1900, c. 598, 31 Stat. 221, 230; Act of March 3, 1901, c. 832, 31 Stat. 1058, 1068; Act of May 27, 1902, c. 888, 32 Stat. 245, 253; Act of March 3, 1903, c. 994, 32 Stat. 982, 989; Act of April 21, 1904, c. 1402, 33 Stat. 189, 199; Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1054; Act of June 21, 1906, c. 3504, 34 Stat. 325, 344.

and forty-two dollars and two cents be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August sixteenth, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: *One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation,* and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by

> the legislative authority of said nation, to be immediately available; * * *. [Italics added.]

This section deals with two funds in two different ways. It directs that the interest on the $1,500,000 fund "be paid semi-annually to the treasurer of said nation"; and that the principal of the $412,942.50 fund "be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same." We do not deny that payments from the second fund are for disbursement to members of the Seminole tribe. On the other hand, we do contend, and the contrasting language of Section 12 emphasizes our contention, that payments for the first fund are for the tribal treasurer. He receives it not as a Federal agent for disbursement according to some prearranged plan, but as a tribal officer responsible only to the Seminole nation which, since the trust is "to the credit of said nation", is itself the cestui que trust.

Any attempt to apply the Curtis Act to this trust would result in changing the beneficiary and would leave the Seminole nation virtually without funds. Congress did not intend to strip the Seminoles of their tribal government and their tribal funds. It is true that *other* tribal governments were corrupt (R. 24–25) and about to be dismantled; but the Seminole government was not in their category. Only three days after the enactment of the Curtis

Act Congress recognized its integrity. Act to Ratify the Agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation, Act of July 1, 1898, c. 542, 30 Stat. 567. In that agreement Congress did nothing to impair its earlier promise that the "Seminoles shall be secured in the unrestricted right of self-government." Article XV of the Treaty of August 7, 1856, 11 Stat. 699. Indeed, it was not until Section 8 of the Indian Appropriation Act of 1904, Act of March 3, 1903, c. 994, 32 Stat. 982, 1008, that Congress provided that "the tribal government of the Seminole nation shall not continue longer than May fourth, nineteen hundred and six."

It was in recognition of a Congressional intent to preserve the Seminole tribal government and to allow it to retain control over its own funds that L. P. Mitchell, Assistant Comptroller, ruled that the Curtis Act did not apply to trust funds such as the one we are now considering. His opinion to the Secretary of the Interior, dated August 23, 1898, Appendix, pp. 38–39, concludes:

> From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds *prior to the time of the extinguishment of its tribal government,* which extinguishment is evidently contemplated in the

> near future; therefore I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.

This contemporaneous ruling as to disbursements under these trust funds deserves particular respect since it was given by an official whose decision was authorized to "govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." Section 8 of the Dockery Act, Act of July 31, 1894, c. 174, 28 Stat. 162, 208.

We submit that there is nothing contrary to our contention or to Comptroller Mitchell's decision in the subsequently withdrawn opinion of Assistant Attorney General Van Devanter, dated July 12, 1898, addressed to the Secretary of the Interior, Appendix, pp. 46–50, or in the opinion of Attorney General Bonaparte, 26 Op. Atty. Gen. 340.

Assistant Attorney General Van Devanter's opinion seems to be concerned particularly with a fund to be derived from coal, gas, and oil royalties mentioned in the Seminole Agreement of 1897, Act of July 1, 1898, c. 542, 30 Stat. 567. It was expressly provided in that Agreement that said fund "shall be paid per capita to the members of said tribe in three equal installments." The Secretary of the Interior asked broadly whether Section 19 of the Curtis Act applied to the Seminole nation. But what he and Assistant Attorney Gen-

eral Van Devanter seem to have had in mind was the narrow issue whether, in distributing the royalty fund, payment should be made through the tribal officers or through appointees of the Secretary of the Interior. Assistant Attorney General Van Devanter answered that the Curtis Act applied to the Seminole Nation, and that in any event, so far as this royalty fund was concerned, its specific terms directed, in much the same words as the Curtis Act, that payment should be through appointees of the Secretary of the Interior.

We do not disagree with the result reached by Assistant Attorney General Van Devanter with respect to the particular royalty trust which he was considering. But we contend that he did not purport to rule upon, and his reasoning does not apply to, a trust like the one for $1,500,000 which we are now considering, which was established to the credit of the Seminole nation and which provides that the interest shall "be paid semi-annually to the treasurer of said nation."

The opinion of Attorney General Bonaparte, dated August 19, 1907, 26 Op. Atty. Gen. 340, is likewise irrelevant. He was asked by the Secretary of the Interior how the payment of money to the Seminole tribe after the fiscal year 1907 was affected not by the Curtis Act but by the Act of April 26, 1906, c. 1876, 34 Stat. 137. Section 11 of that Act, passed after the dissolution of the Seminole tribal government, specifically provided:

> That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him * * *.

The Attorney General ruled that after January 1, 1907, payments should not be made to the tribal treasurer. But that ruling has no application here inasmuch as the statute there considered is subsequent to the period (from the beginning of the fiscal year 1899 through the first half of the fiscal year 1907) now under consideration, and inasmuch as that statute covered "all revenues of whatever character accruing to the * * * Seminole tribes."

There remains for consideration the trust which we have numbered one; see page 6, *supra*. By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702, the Government promised the Seminoles:

> to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the

> two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *

Thus the trust originally provided that the interest should be paid per capita for distribution to members of the Seminole tribe. However, twenty-four years before the Curtis Act the character and purposes of this interest payment were by agreement changed into a payment for the benefit of the Seminole nation itself, like the $1,500,000 trust we have just considered. In the Act of April 15, 1874, c. 97, 18 Stat. 29, Congress provided:

> That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same

> shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained.

This statute is not a mandate which *ipso facto* changes the annuities from per capita disbursements to payments to the nation's tribal treasurer. It merely authorizes the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President, to make an *offer* "to pay such annuities or any part thereof into the treasury of the Seminole nation." The offer is to become effective only if "the consent of said tribe to such expenditures and payment shall be first obtained."

This offer was made and accepted in the manner "authorized by the Act of April 15, 1874" (R. 19). By the act of the Seminole legislature (also called council) of April 2, 1879, the tribe consented that all annuities then due or thereafter to become due to it under the provision of the eighth article of the treaty of August 7, 1856, should be paid into the Treasury of the Seminole nation to be used as the council of the same should provide (Opinion of Comptroller Mitchell, dated Aug. 23, 1898, Appendix, p. 27). Thus there was a consensual and,

so far as the Seminoles were concerned, a binding conversion of the interest due on the trust from payments for the benefit of individual Indians to payments for the benefit of the tribe.

As in the case of the $1,500,000 trust, payments of interest on this $500,000, or first trust, were, from 1879 on, payments to the tribal treasurer as agent of his government, not as Federal disbursing officer. Therefore, when the Curtis Act was enacted, it did not affect this trust for the reasons already advanced in our discussion of the $1,500,000 trust; pages 48–52, *supra*. To apply the Act to this trust would be to do more than affect the *method* of payment; it would, without the consent of the Seminoles, change the *purposes* of the payment from those mutually agreed upon in 1879.

Our contention that Section 19 of the Curtis Act applies to none of the three Seminole trusts is in accordance not merely with the language of the section, the legislative history of the statute, and the purposes of the trusts, but with an administrative construction that had been specifically drawn to the attention of Congress. We have already noted the August 16, 1898, ruling of Comptroller Mitchell, and its peculiar authority under Section 8 of the Dockery Act. See pages 49–50, *supra*. The effect of this ruling was not passed over in silence. In the Annual Reports of the Department of the

Interior for the Fiscal Year ended June 30, 1899, 56th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 197, the Secretary of the Interior transmitted to Congress the report of United States Indian Agent J. Blair Shoenfelt pointing out that—

> By reason of this treaty [the Seminole Agreement of 1897], which was afterwards ratified by Congress, the Seminoles are not under the provisions of the Curtis Act, and the Indian agent does not receive or disburse any of their moneys, it being done by the tribal officers * * *

Two years later, a like report of the same agent, transmitted to Congress as part of the Annual Reports of the Department of the Interior for the fiscal year ended June 30, 1901, 57th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 231, noted that

> By reason of this agreement, which was afterwards ratified by Congress, the Seminoles are not under the provisions of the act of Congress of June 28, 1898, and the Indian agent does not receive or disburse any of their moneys, it being done by tribal officers.

Again, the next year, the report of the same agent indicated that "no revenues or royalties of any character have been collected by me for the benefit of the Seminole Nation during the fiscal year ended June 30, 1902." Annual Reports of the Department of the Interior for the fiscal year ended

June 30, 1902, 57th Cong., 2nd sess., House Doc. No. 5, Indian Affairs, Part I, p. 231.

In the face of these reports Congress continued to make appropriations for the payment of interest on the Seminole trusts. Act of July 1, 1898, c. 545, 30 Stat. 571, 580; Act of March 1, 1899, c. 324, 30 Stat. 924, 933; Act of May 31, 1900, c. 598, 31 Stat. 221, 230; Act of March 3, 1901, c. 832, 31 Stat. 1058, 1068; Act of May 27, 1902, c. 888, 32 Stat. 245, 253; Act of March 3, 1903, c. 994, 32 Stat. 982, 989; Act of April 21, 1904, c. 1402, 33 Stat. 189, 199; Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1054; Act of June 21, 1906, c. 3504, 34 Stat. 325, 344. Thus an administrative construction of the Curtis Act, made thirty-eight years ago, was implicitly ratified by Congress more than thirty-five years ago, and has stood unchallenged until this law suit. We submit that the present case falls well within the doctrine stated by this Court in *Alaska Steamship Company* v. *United States,* 290 U. S. 256, 262:

> Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to * * *. That construction must be accepted and applied by the courts when, as in the present case, it has received Congressional approval, implicit in the annual appropriations over a period of thirty-five years, * * *

"The long established construction and practice of the Department [is] a fact entitled to much weight in a case like this." *Sac and Fox Indians of the*

Mississippi in Iowa v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481, 490.

It is almost unnecessary to add that the construction which the administrative authorities adopted and for which we contend does not render the section meaningless, as the respondent has argued. (Br. Opp. p. 21.) That law applied to several Indian tribes, and even if it affected no Seminole trusts, *non constat* that it did not affect the funds of other Indian tribes. Indeed, the reports of the Department of the Interior to which we have already referred abundantly illustrate that the section did have wide scope.

B. IF THE PAYMENTS WERE MERELY IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE SEMINOLES HAVE NO STANDING TO COMPLAIN OF THAT VIOLATION SINCE THE SECTION GAVE TO THEM NO RIGHT OF ACTION

The respondent's precise contention is this: the payments made to the tribal treasurer from the three trusts (of 1856, 1866, and 1889) during the period from the beginning of the fiscal year 1899 through the first half of the fiscal year 1907 were in violation of *the rights of the Seminoles under Section 19 of the Curtis Act.*

Respondent does not, and could not well, contend that the payments were in violation of the rights of the Seminoles under any treaty, agreement, or other consensual transaction. To the Seminoles all that the Government had directly promised was this: with respect to the trust numbered one, at

least after the modification of 1879, to make annual payments of $25,000 into the treasury of the Seminole nation (18 Stat. 19); with respect to the trust numbered two, to make annual payments of $2,500 for the support of schools and $1,000 for the support of the Seminole government (14 Stat. 755, 756); and with respect to the trust numbered three, to make annual payments of $75,000 to the treasurer of the Seminole nation (25 Stat. 980, 1004). The right of the Seminoles under these consensual arrangements was to have the money paid to the tribe and the tribal officers. This method of payment was specifically stipulated with respect to the $25,000 annuity (after 1879), the $1,000 annuity, and the $75,000 annuity. No method of payment was prescribed with respect to the $2,500 annuity for the support of schools, but from 1899 through 1907 there could have been no *contractual* objection to making the payment to a tribal officer, since, during that period, the Seminole government was conducting its own schools.[17] And in accordance

[17] This statement is corroborated by the annual reports of the Department of the Interior during this period. For examples see the report for the fiscal year ended June 30, 1899, 56th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 94; and the report for the fiscal year ended June 30, 1901, 57th Cong., 1st sess., House Doc. No. 5, Indian Affairs, Part I, p. 135.

[18] The Government should have paid $879,750. See page 10, *supra*. If there was a shortage of $14,797.42, as the present findings seem to indicate, it is not a shortage on account of which the Seminoles have advanced a claim. See footnote 8c on page 34, *supra*.

with the method of payment agreed upon, the Government from 1899 through 1907 is shown to have paid the tribal treasurer $864,702.58 [18] (R. 14, fdg. XII).

What respondent relies upon is not a violation of rights under treaties, agreements, or consensual undertakings but a violation of the Seminoles' supposed rights under Section 19 of the Curtis Act. We submit that Section 19 of the Curtis Act gave no right of action to the Seminoles but was merely a direction to agents of the United States, disobedience of which did not inflict a legal injury upon the Seminoles.

For this point we rely upon the controlling authority of *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States,* 220 U. S. 481, which it is necessary to examine in detail. In that case it appeared that by the Treaty of October 11, 1842, 7 Stat. 596, the Government had promised "to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars." The larger part of this tribe was together in the West, first in Kansas and later in Oklahoma. A band, however, settled in Iowa. Nonetheless, at the outset the Government paid the entire annuity to those who were on the reservation in the West. With this or other similar situations in mind, Congress provided in Section 3 of the Indian Appropriation Act, Act of Aug. 30, 1852, c. 103, 10 Stat. 41, 56:

> That no part of the appropriations herein made, or that may hereafter be made, for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe, or part of a tribe; but shall in every case, be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of a tribe *per capita,* unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President. * * *

Even after the passage of this statute, which, strikingly like Section 19 of the Curtis Act, directed that the officers of the United States make payment due to members of an Indian tribe "directly to the Indian or Indians themselves to whom it shall be due", the Government continued to make payment solely to those who were on the reservation. The Iowa band contended that this was a violation of the 1852 Act, of which they could complain, and accordingly filed their first claim on that basis. This Court denied the claim. Among other reasons for this result, Mr. Justice Holmes stated (220 U. S. 483–484):

> The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The Government did not deal with in-

> dividuals but with tribes. *Blackfeather* v. *United States,* 190 U. S. 368, 377. See *Fleming* v. *McCurtain,* 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes.

It is plain that this quotation gives two reasons. One is that where money has been promised Indians and the promise has been performed in accordance with the agreement but in conflict with a statute giving "a direction to agents of the United States" how to make the disbursement, the Indians have no right to complain. This reason, which is the one upon which we rely, is buttressed by a relevant citation, *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The second reason given in the quotation is that even if the conduct were a wrong to the Indians, the wrong was one of which only the tribe as a whole, and not a fraction of it, could complain. For this principle the citation given by Mr. Justice Holmes is *Blackfeather* v. *United States,* 190 U. S. 368, 377.

In the *Sac and Fox* case, the second claim advanced by the Iowa tribe was based on the Indian Appropriation Act of March 2, 1867, c. 173, 14 Stat. 492, 507. This act, after making the appropriation of the annuity due the Sac and Fox Indians, added a proviso—

> That the band of Sacs and Foxes of the Mississippi now in Tamar county, Iowa, shall be paid pro rata, according to their numbers, of

> the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The Iowa band alleged that the Government failed to distribute in accordance with this proviso. In denying this claim this Court remarked (p. 485):

> This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it.

The third claim presented by the Iowa band was founded on the Indian Appropriation Act of July 4, 1884, c. 180, 23 Stat. 76, 85, where, after an appropriation for interest payable under the treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them from treaty appropriations—

> their per capita proportion of the amount appropriated in this act; subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further,* That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.

The Iowa band alleged that the apportionment had been improper and they had not received a fair share of the per capita payments. In rejecting this claim the Court made the following comment (p. 486), which amplifies the rule already stated:

> But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the

> terms of the treaties by which the contracts were made not with individuals but with the tribes. *The statute neither changed nor conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed.* [Italics added.]

Summarizing the Court's decision rejecting all three claims, Mr. Justice Holmes said (pp. 489–490):

> The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867.

Here again the quotation announces two propositions, of which at least one is directly pertinent to our contention. The proposition on which we rely is that where money has been promised a tribe of Indians, and the promise has been performed in accordance with the agreement but in conflict with a statute giving instructions with respect to disbursements to officers of the United States, the Indians have not had their legal rights infringed.

This proposition and this quotation apply directly to the case at bar. The treaties here "gave rights only to the tribe, not to the members." These treaties, as mutually modified, were followed. The Curtis Act "did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones."

C. IF THE PAYMENTS WERE IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE SEMINOLES ARE ESTOPPED TO COMPLAIN, INASMUCH AS THE PAYMENTS WERE MADE AT THEIR REQUEST AND WITH THEIR CONSENT

Even if the payments were in violation of Section 19 of the Curtis Act, and even if that statute gives to the Seminoles a right of action for its violation, the Seminoles are estopped to complain of the wrong, for the payments were made pursuant to a ruling which they requested and to which they consented.

When the Curtis Act was passed, a question immediately arose whether it applied to the Seminole trusts. The ruling which conclusively settled the question for internal administrative purposes was given by Comptroller Mitchell pursuant to the request of the Seminoles themselves. As the respondent has conceded in this Court (Br. Opp., p. 26), "the tribal officials and their counsel * * * opposed this opinion [of Assistant Attorney General Van Devanter] and had the question transferred to the comptroller." The opinion of the Comptroller (Appendix, page 33) recites:

> The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe * * *.

Moreover, apart from their original request, the Seminoles, through their government representatives, acquiesced in and profited by (R. 14, fdg. XIII) the error, and they are now estopped to complain of it. *Magee* v. *United States,* 282 U. S. 432, 434. They are in the position of beneficiaries who cannot hold the trustee liable for actions with respect to trust property which they request him to take or to which they consent. *Duncan* v. *Jaudon,* 15 Wall. 165, 171–172; *Pope* v. *Farnsworth,* 146 Mass. 339, 344 (per Holmes, J.); *Lannin* v. *Buckley,* 256 Mass. 78, 82; *Matter of Niles,* 113 N. Y. 547, 559; Perry on *Trusts and Trustees* (7th ed.), § 849; American Law Institute, *Restatement of the Law of Trusts,* § 216.

III

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $57,500 WHICH IT PAID OUT OF THE TRUST FUND ESTABLISHED BY ARTICLE III OF THE TREATY OF 1866 TO THE TRIBAL TREASURER FROM 1875 TO 1898 INCLUSIVE

Article III of the Treaty of March 21, 1866, established a trust of $70,000 (R. 12, fdg. VIII) and provided:

> seventy thousand dollars to remain in the United States treasury, upon which the

> United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

Under this treaty the interest on the $50,000 fund, amounting to $2,500 annually, was required to be paid for "the support of schools." During the period from 1875 to 1898 inclusive, the Government paid the annuity direct to the tribal treasurer (R. 13, fdg. IX). The lower court held (Opinion, Item 5. R. 20–22) that the Government violated the treaty in making these payments to the treasurer, and therefore entered judgment against the Government for $57,500 (which apparently represents 23 instead of 24 payments at the rate of $2,500 a year) (R. 22).

We contend that this payment was perfectly proper and in accordance with the treaty. As we have already pointed out, the Seminoles, until 1906, had their own government, see pages 48–49, *supra,* and conducted their own schools, see footnote 17 on page 59, *supra.*[18a] Under these circumstances, the

[18a] See also Annual Reports of the Department of the Interior for the fiscal year ended June 30, 1900, 56th Cong., 2nd sess,. House Doc. No. 5, Indian Affairs, p. 86.

tribal treasurer was an entirely appropriate person to receive the interest payment for the support of schools. It is not shown that he failed to apply the money in the intended manner, and at this distance of time we should presume that he acted with official regularity. See *The Sac and Fox Indians*, 220 U. S. 481, 484.

Moreover, if the payment was erroneous, the tribe, by its governmental representatives, acquiesced in the error, and they are now estopped to attack a payment to which they consented. See pages 65–66, *supra*.

IV

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR THE $154,455.30 WHICH IT PAID FROM 1920 TO 1930 INCLUSIVE OUT OF THE PRINCIPAL OF THE $500,000 TRUST FUND SET APART BY THE SEMINOLE AGREEMENT OF 1897

The Seminole Agreement of 1897, ratified by the Act of July 1, 1898, c. 542, 30 Stat. 567, 568 (R. 26) provided that—

> Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of

> the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

The lower court found (R. 14, fdg. XIII) that the Secretary of the Interior disbursed from the principal of this fund (a) for per capita payments, $25,744.50 in 1920 and $6,701.06 in 1921; (b) for equalization of allotments, $490.22 in 1921; and (c) for education, $17,743.43 in 1922, $16,679.86 in 1923, $247.94 in 1924, $6,504.72 in 1925, $12,809.52 in 1926, $17,815.59 in 1927, $19,685.35 in 1928, $1.29 in 1929, and $30,031.82 in 1930. The lower court held (R. 26–27, Opinion, Item 9) that all of these disbursements from the principal were illegal, and that the Government was liable for the total diversions, amounting to $154,455.30 (R. 27).

Our contention is that the payments were not unlawful but were specifically authorized by Congressional statutes subsequent to the Agreement of 1897. Of course, the respondent does not deny that "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work,* 266 U. S. 481, 485. Such changes fall well within the power of Congress to modify treaties with the Indians. *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Lone*

Wolf v. *Hitchcock,* 187 U. S. 553. The narrow point as to which petitioner and respondent are at issue is: whether Congress did in fact make such changes in the Agreement of 1897 as to authorize the particular payments that were made. This issue requires merely an examination of the relevant statutes, first as to the payments per capita, and then as to the payments for education.

The per capita payments of $25,744.50 in 1920 and $6,701.06 in 1921 were authorized by the Indian Appropriation Act for the fiscal year 1919, Act of May 25, 1918, c. 86, 40 Stat. 561, 580, which provided:

> That *the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians* of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, *out of the Seminole school fund,* or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, *not to exceed $100 per capita: Provided,* That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * * [Italics added.]

There is no dispute that the act authorized the making of some per capita payments out of this $500,000 Seminole School Fund with which we are concerned. In the brief opposing our petition for

certiorari, respondent states (Br. Opp. p. 35): "We admit that this act authorized a *per capita* payment out of the school fund." The difference of opinion between the respondent and ourselves is as to how long that authority continued. The respondent argues that the authority was limited to one year, but we contend that the authority has no limitation in time. The statute does not expressly impose a restriction as to time. And we submit that the mere accident that the authority was included in an annual appropriation act does not show that it has limited duration or applicability. This Court has had frequent occasion to regard as permanent additions to the body of law provisions which were originally enacted as part of an appropriation bill for a single year.[19]

Moreover, in subsequent legislation, Congress recognized that the authority for the making of

[19] For example, the Deficiencies Appropriation Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Ti. 28, § 47, provided the permanent procedure regarding interlocutory injunctions as to orders of the Interstate Commerce Commission; the Act Making Appropriations for the Fiscal Year ending June 30, 1918, for the legislative, executive, and judicial expenses of the Government, Act of March 3, 1917, c. 163, 39 Stat. 1070, 1106, U. S. C., Ti. 5, § 66, added to the criminal law a permanent provision prohibiting officers of the United States from receiving for their official services compensation from outside sources; and the Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 595, U. S. C., Ti. 25, § 32, made permanent provision for accounting by Indian agents. See also the statutes discussed in the *Sac and Fox Indians* case, 220 U. S. 481, and set out *in extenso*, pages 60–63, *supra*.

per capita payments extended beyond 1919 and into 1920 and 1921, the years as to which dispute exists. Thus in the Act of June 30, 1919, c. 4, 41 Stat. 3, 23, Congress directed:

> That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress except as follows: *Equalization of allotments, per capita and other payments authorized by law* to individual members of the respective tribes, * * *

And substantially the same provision was made with respect to the fiscal year 1921 by the Act of Feb. 14, 1920, c. 75, 41 Stat. 408, 427–428, printed in the Appendix, p. 18. These statutes cover not merely the per capita payments, but apparently also the payment of $490.22 for equalization of allotments.

The payments from 1922 through 1930 for education are authorized by the appropriation Acts for this period, Act of March 3, 1921, c. 119, 41 Stat. 1225, 1242; Act of May 24, 1922, c. 199, 42 Stat. 552 575; Act of Jan. 24, 1923, c. 42, 42 Stat. 1174, 1196; Act of June 5, 1924, c. 264, 43 Stat. 390, 398; Act of March 3, 1925, c. 462, 43 Stat. 1141, 1148; Act of May 10, 1926, c. 277, 44 Stat. 453, 460; Act of Jan. 12, 1927, c. 27, 44 Stat. 934, 948; Act of March 7, 1928, c. 137, 45 Stat. 200, 216; Act of March 4, 1929, c. 705, 45 Stat. 1562, 1577 (all of which are printed in the Appendix, pages 19–23). In each of these

years (except 1929, where the provision has a slightly different form) Congress provided that:

> The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations.

There is no dispute that these statutes authorize the use of the *interest* on the Seminole $500,000 School Fund for payments for education from 1922 through 1930 (Br. Opp., p. 36). The question at issue is whether they also authorize the use of the *principal* for that purpose.

We contend that the authority is not expressly limited to payments of interest, and that in the statute there is an implication to the contrary. Congress' primary purpose was "to continue during the ensuing fiscal year the tribal and other schools." If for that end payments of principal were necessary, then they were authorized. And, indeed, such payments must have been anticipated, for the Seminole fund was substantially reduced by the per capita expenditures in 1919, 1920, and 1921, see pages 70–72, *supra,* and the interest available on the reduced fund would not thereafter have sufficed to continue the schools.

The only argument advanced against our contention is that when it was created the fund was described "as a *permanent* school fund." But

this, though some indication of an original intent not to spend principal, is not strictly promissory and does not prevail against a subsequent direction of Congress. See page 69, *supra*.

V

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR $9,068.24 ON ACCOUNT OF ITS PROMISE, UNDER ARTICLE VI OF THE TREATY OF 1866, TO CONSTRUCT AGENCY BUILDINGS

By Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758 (R. 12–13, fdg. VIII) the Government promised the Seminoles—

> that the United States shall cause to be constructed, at an expense not exceeding ten thousand ($10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

The Government disbursed for this purpose the sum of $931.76 (R. 13–14, fdg. XI). The lower court held the Government liable for the difference

between that sum and $10,000, or $9,068.24 (R. 23, Opinion, Item 7).

Our first contention is that the Government never broke its treaty obligation. The respondent and the lower court have entirely misunderstood this article of the treaty. The Seminoles were "to cede forever to the United States one section of their lands." Upon these lands the United States was to "erect suitable agency buildings", to be "used by the United States." When the buildings were "no longer used by the United States" the "land shall revert to said nation", "upon said nation paying a fair value for said buildings at the time vacated."

It is clear that the Seminoles were not concerned with the value of the buildings so long as the United States held them. They were interested only when the United States no longer wanted the buildings, and the Seminoles could re-acquire the land upon paying a fair value for said buildings. It was to the interest of the Seminoles to have the buildings cost less rather than more. For their protection a clause was inserted stating that the Government would erect buildings "at an expense of *not exceeding* ten thousand dollars", not at an expense of *at least* ten thousand dollars. And the Government has performed this promise.

Even if we take the lower court's view and assume that there was an affirmative promise, the promise was indefinite in amount. Moreover, sub-

sequent appropriation acts of Congress did not fix the obligation as the respondent argues (Br. Opp. p. 39). Those acts were unilateral in character. They merely set for administrative authorities an *upper* limit for expenditure. Obviously there was no intent to require the head of a department to spend to the last cent the amount made available to his department.

Finally, we contend that if the Government did break its obligation, the liabilities for that breach have been ascertained by following an erroneous rule of damages. The lower court has held that the Government is liable for the difference between (1) what the lower court regarded as the value of the buildings that the Government had promised to erect and (2) the amount actually expended by the United States. But that rule of damages is appropriate only if the promisee is to own and occupy the premises. Here the Indians were not to do either; they were merely to be business invitees. They were damaged by the difference, if any, between (1) the value of doing business with a government agent who occupies a $10,000 building and (2) the value of doing business with a government agent who occupies a building costing $931.76.[19a]

[19a] "The rule of the common law is * * * that the actual loss caused by breach of contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions." *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 100; 3 Williston, *Contracts*, § 1338.

VI

THE GOVERNMENT IS NOT LIABLE TO THE SEMINOLES FOR $61,563.42 ON ACCOUNT OF ITS PROMISE IN ARTICLE VIII OF THE TREATY OF 1856 TO PROVIDE ANNUALLY FOR TEN YEARS $3,000 FOR THE SUPPORT OF SCHOOLS, $2,000 FOR AGRICULTURAL ASSISTANCE, AND $2,200 FOR THE SUPPORT OF SMITHS AND SMITH SHOPS

By Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702 (R. 10, fdg. III), the Government promised the Seminoles

> to provide annually for ten years the sum of three thousand dollars for the support of schools, two thousand dollars for agricultural assistance, and two thousand two hundred dollars for the support of smiths and smith shops among them. * * *

The period covered by this Article is from the fiscal year 1858 to 1867, inclusive (R. 11, fdg. IV). The lower court did not find how much the Government spent in each year. However, it did find that during each of the ten years the money was regularly appropriated, but in the period as a whole only $10,436.58 was spent for the purposes originally intended (R. 11, fdg. IV). In its opinion it recognized that more than the equivalent of the balance of the money appropriated had during the Civil War been diverted to loyal refugee Indians (R. 18. Cf. R. 11, fdg. V). The Government contended that these diversions to loyal Indians were authorized by statute and approved by treaty; that by virtue of this authority the Government could not be

held liable for shortages until the year 1867; and that for the year 1867 the shortage was only $2.50. However, the lower court ruled that as a matter of law the diversions were not authorized and entered judgment against the United States for $61,563.42, the difference between the amount due for 10 years, $72,000, and the amount expended for the purposes contemplated in the treaty (R. 16–18; Opinion, Item 1).

We have four grounds for contending that the diversions up to and including 1866 were authorized: the Resolution of February 22, 1862; the Indian Appropriation Act of 1863; the Indian Appropriation Acts of 1864, 1865, and 1866; and the Treaty of March 21, 1866.

A. THE RESOLUTION OF FEBRUARY 22, 1862

In chronological order, our first reliance is upon the Resolution of February 22, 1862, No. 13, 12 Stat. 614, which provides:

> That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

This statute authorized the Secretary of the Interior to divert to loyal refugee Indians "annuities payable to the Seminoles." We have noted that in fact more than the equivalent of the amount appropriated up to and including 1866 was diverted (R. 18), and the point at issue is whether this statute authorized such diversion. This turns on whether payments of this type are included in the scope of the statute; and if so, for what years.

In our opinion, the word "annuities" embraces the payments now in question. Certainly the payments fall within the usual interpretation of the term "annuities", which ordinarily means fixed annual payments to be paid absolutely and without contingency. *Peck* v. *Kinney,* 143 Fed. 76, 80 (C. C. A. 2d); *Bacon* v. *Commissioner of Corporations and Taxation,* 266 Mass. 547, 549; *Town of Hartland* v. *Damon's Estate,* 103 Vt. 519, 531. The respondent takes the position that the term is strictly limited to annual per capita payments of income on Seminole trusts. But such an extraordinary construction has no linguistic or other justification. In the drafting or construing of Indian statutes "annuity" is not a word of art, or, if it has a technical significance, it is a generic term embracing annual payments for education, agriculture, and blacksmiths, as well as the particular species of annual disbursements known as "per capita" payments. Moreover, the *policy* embodied in this particular statute applies as much

to annual payments for blacksmiths and the like as to annual payments per capita. In either case Congress intended to punish and to withhold the sinews of war from disloyal Indians.

It is more difficult to be certain which years are embraced in the statute. Annual payments due prior to the enactment of the statute seem to be covered by the descriptive clause "which have not been paid, in consequence of the cessation of intercourse with those tribes." Annual payments subsequent to enactment are covered by the clause "payable to the Seminoles" only if the sentence is regarded as elliptic and is read as though it provided "out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and *out of the annuities* which have not been paid", etc. This reading, we submit, is, in view of the purposes of the statute, not unjustifiable.

B. THE INDIAN APPROPRIATION ACT OF 1863

However, whether the statute just considered furnishes a total or a partial defence for the period from 1858 to 1866 is perhaps immaterial, in view of the Indian Appropriation Act of 1863, Act of July 5, 1862, c. 135, 12 Stat. 512, 528, which provides:

> For defraying the expenses of the removal and subsistence of Indians in Oregon and Washington Territory (not parties to any treaty) and for pay of necessary employees, fifty thousand dollars: *Provided,*

That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: Provided further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth, shall be made on advertisement, as provided in other cases, and an account shall be rendered of all such purchases, with a statement of the prices paid therefor: *And provided further,* That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby

> authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

There can be no doubt whatsoever that the first proviso of this statute is broad enough to cover payments of the type we are now considering, whether the payments were made before or after its enactment. The proviso expressly applies to "all appropriations heretofore or hereafter made to carry into effect treaty stipulations." But the respondent contends that this statute never came into operation because, to become effective, it required Presidential action.

To that argument our first answer is that, properly construed, the statute requires no executive impetus; it *ipso facto* imposes the prohibition. It gives to the President the power to raise this prohibition, but not the power originally to impose it. The exact language used is that the appropriations "may and *shall* be suspended and postponed wholly or in part at and during the discretion and pleasure of the President." This is a mandate of immediate suspension with a condition subsequent. The difference between a condition subsequent and a condition precedent is emphasized by contrasting language in other parts of the same section of the statute. In the second proviso, the one immediately following the ban, and more particularly in the final proviso at the very end of our quota-

tion from the statute, the Act gives to the President additional authority over other matters. In the final proviso, executive action is clearly made a condition precedent to the operation of the statute; and, as we should expect, there, standards are prescribed and findings required. Thus, the President is authorized to abrogate treaties only "if, in his opinion, the same can be done consistently with good faith and legal and national obligations." The very absence of standards and a requirement of a finding in the first proviso, the one with which we are concerned, should incline this Court, if the matter were doubtful, to construe it as making executive action a condition subsequent. This would avoid a question as to the constitutionality for there is no requirement that standards be prescribed where an exemption or benefit is granted. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, 507. Such a situation is unlike the case of a statute which imposes a ban or suspension. Cf. *Field* v. *Clark*, 143 U. S. 649, 693–694; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415, 426; *Schechter Corp.* v. *United States*, 295 U. S. 495, 529–530.

If, however, the clause be construed as requiring an affirmative direction by the President as a condition precedent, we are justified, after the lapse of so many years, in inferring that it was given. The appropriations were in fact paid by the Government for loyal and refugee Indians and, as Mr. Justice Holmes said in a parallel case, "we must

presume, at this distance of time, that its decision was made under the direction of the President." *The Sac and Fox Indians,* 220 U. S. 481, 484

C. THE INDIAN APPROPRIATION ACTS OF 1864, 1865, AND 1866

Our third defense to the claim we are now considering rests upon Section 3 of the Indian Appropriation Act of 1864, Act of March 3, 1863, c. 99, 12 Stat. 774, 793; Section 2 of the Indian Appropriation Act of 1865, Act of June 25, 1864, c. 148, 13 Stat. 161, 180; and Section 5 of the Indian Appropriation Act of 1866, Act of March 3, 1865, c. 127, 13 Stat. 541, 562 (all set forth in the Appendix, pages 11-14). The Indian Appropriation Act for 1864 provides as follows (12 Stat. 793):

> That the Secretary of the Interior be, and he is hereby authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal:
> * * *

The succeeding appropriation Acts repeat the language almost verbatim. See Appendix, pages 12–14. In each case the language is direct and unequivocal. The Secretary of the Interior is authorized to divert to loyal refugee Indians "such part of the amount heretofore appropriated to carry into effect any treaty stipulation with * * * the * * * Seminoles * * * as may be found necessary." It seems to us that, so far as concerns diversions up to and including the appropriations for the fiscal year 1866 (13 Stat. 541, 562), this defense alone, without reference to any other statute or treaty, is unanswerable;[20] and neither the lower court nor, so far, the respondent has tried to give an answer.

D. THE TREATY OF MARCH 21, 1866

Our fourth and final defense is based on Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759–760, which provides:

> The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of an-

[20] If, as we maintain, Congress did modify the treaty of 1856 by statutes in 1863, 1864, and 1865, this modification was effective without the approval of the Indian tribe. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

> nuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

The opening sentence of this Article has two releases: one a release by the Seminoles of "all claims of said Seminoles [against the United States] for damages and losses of every kind growing out of the late rebellion"; the other a release probably by the United States, but perhaps by the Seminoles, of claims on account of "all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians." In the second sentence the "Seminoles hereby ratify and confirm all such diversions of annuities."

We construe this Article as giving us a double defense. We rely at the outset upon the first release in the opening sentence. The administrative authorities diverted the annual payments because of the disloyal acts of the Seminoles and the assistance they afforded "the rebels." Hence it may

properly be said that the diversion was a damage or loss to them "growing out of the late rebellion." We also rely upon the second sentence. We have already pointed out, pages 78–79, *supra,* that in our opinion the term "annuities" is broad enough to cover the annual payments now in question. If our position is sound, then the diversions were specifically ratified and confirmed by this treaty.

If this Court sustains any one of the four defenses we have outlined, the judgment of $61,563.42 given below should be reversed, and the case remanded to the Court of Claims for appropriate proceedings. Presumably that court will then make findings as to—

> (1) how much of the money appropriated, pursuant to Article VIII of the Treaty of August 7, 1856, during the nine-year period from 1858 to 1866, for support of schools, for agricultural assistance, and for the support of smiths and smith shops, was diverted to enable such individual members of the Cherokee, Creek, Choctaw, Chickasaw, Seminole, Wichita, and affiliated tribes, as had been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they could be removed to their homes, and to assist them in such removal;
>
> (2) how much the Government spent pursuant to Article VIII of the Treaty of August 7, 1856, during the fiscal year 1867, for the support of schools, for agricultural

assistance, and for the support of smiths and smith shops.

Of course it will be unnecessary to order this partial remand if this Court agrees with our contention made under Point I, page 32, *supra,* that the Court of Claims had no jurisdiction of the Seminole claim for $61,563.42.

VII

THE GOVERNMENT IS ENTITLED TO HAVE SET OFF AGAINST ITS UNDERPAYMENTS OF AMOUNTS DUE IN SOME YEARS UNDER ARTICLE VIII OF THE TREATY OF 1856 AND ARTICLE III OF THE TREATY OF 1866 THE AMOUNTS BY WHICH IN OTHER YEARS IT MADE OVERPAYMENTS OR MISCELLANEOUS PAYMENTS ON THOSE AND OTHER TREATY OBLIGATIONS

The Government was obligated to pay to the Seminoles an annuity of $25,000 under Article VIII of the Treaty of 1856 (R. 10–11, fdg. III) and an annuity of $3,500 under Article III of the Treaty of 1866 (R. 12, fdg. VIII). In *several years* the Government fell short of the amount it promised. The lower court found (R. 11–12, fdg. VI; R. 13, fdg. IX) that the gross underpayments with respect to the first trust amounted to $154,551.28 (R. 19–20, Opinion, Item 3), and with respect to the second trust amounted to $3,097.20 and $750 (R. 20–22, Opinion, Item 5).

The Government contended that against this gross shortage it was entitled to receive credit or offsets for the amounts by which in *other years* it had made overpayments or miscellaneous payments

with respect to Article VIII of the Treaty of 1856, Article III of the Treaty of 1866, and other obligations. The lower court refused to make findings as to whether or not there had been overpayments or miscellaneous payments, but ruled that such payments could not be considered because (R. 20):

> The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to "hear, examine, consider, and adjudicate." Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court, under the jurisdictional act, is without authority to offset against the plaintiff's claim.

This ruling seems to rest on three grounds, the first two of which are conclusions of law and the third a purported statement of fact: (1) that the Court of Claims had no jurisdiction to decide whether the Government was entitled to an offset because no counterclaim was filed; (2) that if the Government did overpay the amount of income due in any year, it was a "gratuity", for which recovery could not be had; and (3) that it is not established that the Seminoles received the benefit of the payments.

Of course, if the third ground were buttressed by a specific finding of fact, we would have no standing in this Court to raise the questions of law. But

it is a loose, entirely unsupported statement. In the findings of fact there is no technical finding one way or the other respecting the overpayments and miscellaneous payments. This is brought out by the obvious and suspicious gaps in the table in finding VI (R. 12), which invites scrutiny. It states, for example, what happened in 1876, but it entirely neglects 1877. If the lower court had made findings with respect to 1877, it would necessarily, on the uncontradicted evidence of the very pages of the General Accounting Office Report to which its table refers (see Appendix, page 52), have found that in 1877 the Government made an overpayment of $11,381. We cite this example merely for purposes of illustration.

Thus we have a situation in which the *findings* of fact do not and could not furnish any warrant for the loose statement of fact in the opinion. The ruling of the Court can stand only if one of its two propositions of law is sound.

The first proposition of law is that because the Government did not file a counterclaim, it is not entitled to set off against underpayments in one year overpayments in other years. This proposition is untenable if the case is, as the respondent has repeatedly contended (Br. Opp. 14), founded on a petition by a beneficiary for a general accounting. It would be anomalous for a beneficiary to be able to ignore the net balance shown by the accounts and to hold the trustee liable only for those

items in the account which favored him. And this is not the law. It is well settled that "in a bill for an accounting, both parties are actors, and a defendant may have a decree in his favor without the aid of a cross-bill." *Braman* v. *Foss,* 204 Mass. 404, 411; *Arwshan* v. *Meshaka,* 288 Mass. 31, 33. It is hornbook learning that in a suit against a trustee for an accounting, he is entitled to credit against or withhold from any amount owing to the beneficiary any amount already paid the beneficiary when it was not due. *Livesey* v. *Livesey,* 3 Russ. 287, 295–296; *Dibbs* v. *Goren,* 11 Beav. 483, 484; *Hammond* v. *Hammond,* 169 Mass. 82, 85; *Bailey* v. *Smith,* 214 Mass. 114, 120; *King's Estate,* 147 Pa. 410; *Equitable Trust Co.* v. *Miller,* 185 N. Y. Supp. 661, aff'd, 197 App. Div. 391, aff'd, 233 N. Y. 650; Perry, *Trusts and Trustees,* 7th ed., § 915, 930; Bogert, *Trusts and Trustees,* pp. 2364–2365. This hornbook rule is not affected by Section 3 of the jurisdictional statute Act of May 20, 1924, c. 162, 43 Stat. 133, 134, which provides:

> SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

That section obviously refers to offsets arising from transactions in no way related to the transaction on which the principal claim is founded, and is intended to give the United States additional procedural rights, not to cut down those already existing.

The second proposition laid down by the lower court, that the payments were outside of the provisions of the treaty and as such were gratuities, is a ruling that depends on facts not shown in the record. The lower court has neglected to make findings as to the payments or their purposes. Hence we cannot tell if the ruling is correct. Since the judgments of $154,551.28, $3,097.20, and $750 rest upon rulings of law unsupported by the findings of fact, the case should be remanded to the Court of Claims.

Presumably when the case is returned to that court it will examine the particular offsets claimed by the Government and will determine (from evidence admittedly not now before this Court, but the general character of which is idential with that upon which findings were made, and the tenor of which is indicated in the Appendix, pp. 51–54)—

> (1) whether the Government, on account of its obligation to pay interest of $25,000 annually on the trusts established by Article VIII of the Treaty of August 7, 1856, paid (a) $25,082.25 in 1875, $36,381 in 1877,

$25,454 in 1880, $25,028 in 1882, and $25,182.29 in 1883 (General Accounting Office Report, pages 153–156); and (b) at the request of the Council of the Seminole Nation, $17,821 to individuals in 1870, and $11,101.64 to satisfy drafts in 1874 (General Accounting Office Report, pages 152, 153).

(2) whether the Government, on account of its obligations to pay interest of $25,000 annually on the trusts established by Article VIII of the Treaty of August 7, 1856, and $3,500 annually on the trusts established by Article III of the Treaty of March 21, 1866 (or a total of $71,250 for the second half of 1907, for 1908, and 1909), paid $71,250, as follows: $42,747 in 1908, $11,002.96 in 1909, $15,200 in 1910, $2,100 in 1919, and $200.04 in 1921 (General Accounting Office Report, pages 308–310).

(3) what, if any, net balance there is if the payments mentioned in the preceding paragraphs are offset against the underpayments of $154,551.28, $3,097.20, and $750, for which the Government was held liable in the Opinion of the Court of Claims, Items 3 and 5 (R. 20, 22).

Of course, it will be unnecessary to order this partial remand if this Court agrees with our contention, made under Point I, *supra,* that the Court of Claims had no jurisdiction of the Seminole claims for underpayments of $61,563.42, $3,097.20, and $750 (pages 33–34, numbers (4) and (5), *supra*).

CONCLUSION

In view of the foregoing, we respectfully submit that the judgment of the Court of Claims should be reversed or, in the alternative, reversed and remanded.

Respectfully submitted.

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